Supreme Court, U.S.
FILED

10-638 NOV 9 - 2010

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No. 10-

IN THE

Supreme Court of the United States

NANCY J. WETHERILL,
Petitioner,

v.

PETE R. GEREN, SECRETARY OF THE ARMY; THE ARMY NATIONAL GUARD; STEVEN R. DOOHEN, BRIGADIER GENERAL, IN HIS OFFICIAL CAPACITY AS ADJUTANT GENERAL OF THE SOUTH DAKOTA NATIONAL GUARD; THEODORE JOHNSON, BRIGADIER GENERAL, IN HIS OFFICIAL CAPACITY; AND THE SOUTH DAKOTA ARMY NATIONAL GUARD,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

The *Feres* doctrine bars suits by members of the military for injuries that "arise out of or are in the course of activity incident to" military service. By statute, Congress provides that certain employees of the National Guard, known as "dual-status technicians," are "[f]ederal civilian employee[s]" for "purposes of this section and any other provision of law." 10 U.S.C. § 10216(a)(1). Congress also has provided by statute that the protections of Title VII of the Civil Rights Act of 1964 apply to "employees . . . in military departments." The question presented, over which the federal courts of appeals are split, is as follows:

Whether the claims of a dual-status National Guard technician alleging employment discrimination under Title VII of the Civil Rights Act of 1964 are jurisdictionally barred by the doctrine of *Feres v. United States*, 340 U.S. 135 (1950) and its progeny?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nancy J. Wetherill respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 616 F.3d 789. App. A, at 1a. The order and opinion of the district court is reported at 644 F. Supp. 2d 1135. App. B, at 26a.

JURISDICTION

The court of appeals entered its judgment on August 11, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The petition involves the following provisions, set forth in the appendix, App. C, at 39a:

10 U.S.C. § 10216(a)

32 U.S.C. § 709(b)

42 U.S.C. § 2000e-2(a)

42 U.S.C. § 2000e-3(a)

42 U.S.C. § 2000e-5(f)

42 U.S.C. § 2000e-16(a)

42 U.S.C. § 2000e-16(b)

42 U.S.C. § 2000e-16(c)

42 U.S.C. § 2000e-16(d)

29 C.F.R. § 1614.407

STATEMENT OF THE CASE

This case presents the question whether a "dual-status" technician in the National Guard – defined by statute to be a position of "civilian employ[ment]" for the purposes of "any . . . provision of law" – may bring suit alleging employment discrimination under Title VII of the Civil Rights Act of 1964. The courts below noted a split among the federal courts of appeals on the issue and joined those courts holding that such suits are nonjusticiable because they challenge conduct "incident to military service." App. A, at 11a-13a.

Wetherill's Employment. Wetherill began her career with the South Dakota Army National Guard ("SDARNG") in 1974. From April 1, 2007 through July 31, 2008, she was the Director of Operations for the SDARNG – a dual-status technician position – in Rapid City, South Dakota. *Id.* at 3a. As a condition of her employment as a dual-status tech ician, federal law mandated that Wetherill maintain membership in the Selected Reserve. 10 U.S.C. § 10216(a)(1)(B).

Wetherill's responsibility as Director of Operations was her daily job, for which she was paid as a civilian employee under the Civil Service system. App. A, at 3a. By contrast, the military portion of her duties was limited – including "drilling" one weekend per month and attending an annual two-week Guard training. See, *e.g.*, 32 U.S.C. §§ 502, 709(b)(2); *Walch v. Adjutant General's Dep't of Tex.*, 533 F.3d 289, 291 (5th Cir. 2008) (recognizing that a dual-status technician has "an obligation simply to drill for a weekend every month and then to train for

two weeks in the summer" in addition to her "full-time civilian position").

Wetherill's Eligibility for Civilian Retirement Benefits. As a federal civilian employee, Wetherill was potentially eligible for full annuity payments under the Civil Service Retirement System ("CSRS"). But in order to achieve eligibility for such payments, Wetherill needed to keep her position until December 2010. App. A, at 3a. An earlier retirement date would not eliminate but would reduce Wetherill's annuity, as she would not have garnered the requisite number of civilian service years to warrant a full annuity. *Id.*

Pursuant to federal law, Wetherill's Mandatory Removal Date ("MRD") from the military was July 31, 2007. 10 U.S.C. § 14507(b). Once removed from the military, she would be required to quit her Director of Operations position. In May 2007, Major General Michael Gorman, then-Adjutant General of the SDARNG, requested that the National Guard Bureau ("NGB") "waive" Wetherill's MRD and retain her until December 30, 2010. The request was approved. App. A, at 4a.

In September 2007, Steven R. Doohen succeeded Gorman as Adjutant General. *Id.* In January 2008, Doohen requested revocation of Wetherill's MRD waiver. The NGB granted the request the next month, and Wetherill's removal date was set at July 31, 2008. Consequently, Wetherill would be forced to retire from her Director of Operations job on July 31, 2008. *Id.*

Wetherill's Termination. In February 2008, Theodore Johnson, another dual-status technician

and Wetherill's supervisor, told Wetherill she was being terminated from her technician position due to "force management" reasons, effective July 31, 2008. App. B, at 25a. Doohen's revocation of Wetherill's MRD waiver, meanwhile, already required her to leave the Director of Operations position on that date. App. A, at 5a.

No other technician in the SDARNG has ever had an MRD waiver denied, modified, or revoked. *Id.* at 4a. Wetherill, the only Asian-American female in the SDARNG, believed that Doohen's decision was based on animus towards her gender and national origin. *Id.* She also believed that Johnson's statements regarding her "termination" from the Director of Operations position were pretextual. App. D, at 47a.

EEO Proceedings and Subsequent Retaliation. Between February and May of 2008, Wetherill protested Doohen's revocation of her MRD waiver. *Id.* at 46a. She also informally complained to the Equal Opportunity and Civil Rights Office at the National Guard Bureau. App. A, at 4a. In May of 2008, after unsuccessful informal attempts at resolution with her Equal Employment Opportunity ("EEO") counselor, Wetherill submitted a formal EEO complaint. App. D, at 50a.

Shortly after voicing her protests and bringing her EEO complaint, Wetherill was reassigned to work in an isolated building with no other occupants. She was forced to perform tasks for which she was considerably over-qualified. App. A, at 4a. These actions were taken against her at Johnson's behest, and Wetherill believes that they were taken in retaliation for her protests of the revocation of her MRD waiver. App. D, at 47a.

On July 1, 2008, Wetherill received a notice of dismissal of her complaint from the NGB Office of Equal Opportunity and Civil Rights. App. D, at 44a. The notice specifically provided that Wetherill was "authorized under Title VII . . . to file a civil action in an appropriate United States District Court." App. D, at 59a.

As a result of Doohen's revocation of her MRD waiver, Wetherill was forced to retire from her military position on July 31, 2008. App. A, at 5a. Pursuant to federal law, she also was forced to retire from her civilian Director of Operations position with the SDARNG. *Id.*

District Court Proceedings. Wetherill brought suit alleging she was discriminated against on the basis of her gender and national origin and subsequently retaliated against after complaining about the discrimination. *Id.* Wetherill invoked 42 U.S.C. § 2000e-16 in her complaint. That statute specifically vests employees of "military departments" with the Title VII protections against "any [employment] discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). See App. D, at 39a, 43a.

Wetherill's complaint named several defendants: Pete R. Geren, Secretary of the Army, the Army National Guard ("ARNG") (collectively, the "federal defendants"); and Doohen, Johnson, and the SDARNG (collectively, the "state defendants"). App. D, at 44a. Both the federal and state defendants moved to dismiss Wetherill's complaint under Rules 12(b)(6) and 12(b)(1). App. B, at 29a-30a. The district court evaluated both as 12(b)(6) motions and granted the motions to dismiss, holding that Wether-

ill's claims were barred by the rule announced in *Feres v. United States*, 340 U.S. 135 (1950), because her injury was incident to military service. App. B, at 34a-37a. It reached this holding despite the fact that 10 U.S.C. § 10216(a)(1) expressly defines dual-status technicians as "Federal civilian employee[s]" for "purposes of this section and any other provision of law," and despite the fact that Title VII expressly extends its protections to "employees . . . in military departments," 42 U.S.C. § 2000e-16(a). App. B, at 37a.

Appellate Proceedings. The court of appeals affirmed, but it recognized two conflicts among circuits respecting the application of the *Feres* doctrine to claims brought by dual-status technicians. App. A, at 2a. First, the court addressed the interplay of *Feres* and 10 U.S.C. § 10216(a)(1). *Id.* at 9a-12a. The court acknowledged the Federal Circuit's conclusion in *Jentoft v. United States*, 450 F.3d 1342 (Fed. Cir. 2006), that *Feres* does not apply to dual-status technicians because they are defined to be "Federal civilian employees" by § 10216(a)(1). App. A, at 11a-12a. But the court declined to follow *Jentoft*. It believed that the statutory language could not literally mean that dual-status technicians are "civilian employee[s]" for all purposes because no such intent was revealed in the legislative history of the statute, and Congress does not "hide elephants in mouseholes." App. A, at 12a-15a (citation and internal quotation marks omitted). Thus, the court joined "the Fifth and Ninth Circuits in holding that the 1997 amendments to 10 U.S.C. § 10216 do not remove dual-status National Guard technicians from the strictures of the *Feres* doctrine." App. A, at 13a-14a.

The court of appeals next turned to the applicability of *Feres* to Wetherill's case. Once again, the court recognized a split among the circuits. It noted that the Sixth Circuit holds that claims by dual-status technicians are inherently incident to military service and therefore nonjusticiable under *Feres*. App. A, at 18a. Other circuits, in contrast, apply a variety of fact-specific inquiries designed to determine whether the claim at issue arose out of "activity incident to military service." App. A, at 18a. The court determined that Wetherill's claims were nonjusticiable because her supervisors claimed a "military motive" for the revocation of her MRD waiver, and her claims thus were incident to military service. App. A, at 19a. This petition timely followed.

REASONS FOR GRANTING THE WRIT

1. The Court should grant a writ of certiorari to resolve a question of national importance over which there are two acknowledged splits among the federal courts of appeals: whether, and, if so, how, the *Feres* doctrine applies to dual-status technicians alleging employment discrimination. First, there is a split over whether dual-status technicians are *ever* subject to *Feres*. Second, there is a split among those courts that do apply *Feres* to dual-status technicians over when it is appropriate to do so. This case presents an ideal vehicle to resolve these splits because the courts below resolved each adversely to petitioner, which was the sole basis of the final disposition of her claims.

2. The Court should also grant the writ because the decisions below were wrongly decided. Petitioner alleged that she was the victim of discrimination based on gender and national origin that deprived

her of a civilian vocation. *Feres* – a federal-common-law doctrine – cannot be applied to this claim because Congress has clearly stated that dual-status technicians are civilians. And even absent such a clear statement, *Feres* should not apply to such claims brought by dual-status technicians because they are far removed from core-combat functions of the military that *Feres* sought to protect and because Congress intended Title VII's protections to extend to civilian employees of the military departments.

I. Federal Courts Of Appeals Are Divided Over Whether And How The *Feres* Doctrine Applies To Dual-Status Technicians.

The federal courts of appeals are squarely divided over whether tort claims by dual-status technicians are justiciable. This division concerns the proper application of the *Feres* doctrine, which holds that "the Government is not liable under the Federal Tort Claims Act ['FTCA'] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to" military service. *Feres*, 340 U.S. at 146. This split has two dimensions, both of which are implicated in this case: (1) whether Congress's plain statement that dual-status technicians are "civilian employee[s]" for "any . . . provision of law" supersedes the common-law *Feres* doctrine; and (2) if not, whether claims by dual-status technicians are "incident to military service" within the meaning of *Feres*. These splits are mature and are unlikely to be resolved by the passage of time, and each operates to treat plaintiffs differently based solely on where they happen to bring suit.

First, the federal courts of appeals are split over whether the *Feres* doctrine applies at all to dual-

status technicians. The courts disagree over the effect of Congress's statement in 10 U.S.C. § 10216(a)(1) that a dual-status technician is "a Federal civilian employee" "[f]or purposes of this section and any other provision of law." The Federal Circuit holds that "the plain language of § 10216(a) makes clear that" dual-status technicians are civilians, and that courts must therefore "give priority to the statutory enactment of Congress" over the common-law doctrine announced in *Feres*. *Jentoft*, 450 F.3d at 1349. In contrast, the Fifth, Sixth, Eighth, and Ninth Circuits have expressly disagreed with the ruling in *Jentoft* and hold that § 10216(a) has no bearing on the applicability of *Feres*. These courts do not believe that the statute "constitutes clear direction from Congress" because of the lack of an indication in the legislative history of the statute that Congress intended to overrule prior cases that had barred claims by dual-status technicians under *Feres*. See, *e.g.*, *Zuress v. Donley*, 606 F.3d 1249, 1251 (9th Cir. 2010), *cert. filed*, No. 10-374, 79 U.S.L.W. 3149 (U.S. filed Sept. 16, 2010); see also *Bowers v. Wynne*, 615 F.3d 455, 467 (6th Cir. 2010); *Williams v. Wynne*, 533 F.3d 360, 366-67 (5th Cir. 2008). The effect of this split is to treat identically situated dual-status technicians differently based solely on where they file their lawsuits; and as to allegations over which the Court of Federal Claims has concurrent jurisdiction with the federal district courts, the split is an obvious invitation to forum shopping.

Second, the courts of appeals that do not treat § 10216(a)(1) as controlling are also split on the proper analytical framework for deciding whether a particular claim by a dual-status technician is justiciable under *Feres*. The Fifth Circuit espouses the

"purely civilian" approach, which holds that a technician's Title VII claim is cognizable if it challenges conduct taken purely in the civilian capacities of those involved. See *Brown v. United States*, 227 F.3d 295, 299 (5th Cir. 2000).[1] The Ninth Circuit asks whether "the challenged conduct is integrally related to the military's unique structure." *Mier v. Owens*, 57 F.3d 747, 750 (9th Cir. 1995). The Second Circuit apparently applies both the "purely civilian" and the "integrally related to military structure" approaches. *Overton v. N.Y. State Div. of Mil. & Naval Affairs*, 373 F.3d 83, 88 (2d Cir. 2004). And the Sixth Circuit simply applies a categorical bar on claims by dual-status technicians, concluding that technicians occupy a position that is, per se, "irreducibly military in nature" – even when an injury occurs in the course of the plaintiff's civilian employment. See *Bowers*, 615 F.3d at 468 (Air Reserve Technicians); *Fisher v. Peters*, 249 F.3d 433 (6th Cir. 2001) (National Guard Technicians). In the proceeding below, the Eighth Circuit declined to adopt the categorical bar utilized in the Sixth Circuit, but also staked out yet another approach by holding that any of the other approaches outlined above could be applied, depending upon the "particular set of facts or a particular legal claim." App. A, at 18a.

The courts of appeals have struggled at times even with the application of their own tests. In *Overton*, for example, Judge Pooler wrote separately to express his concern that the Second Circuit had

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[1] The characterization of the Fifth Circuit's approach as the "purely civilian" test was made by the Second Circuit in *Overton v. N.Y. State Div. of Mil. & Naval Affairs*, 373 F.3d 83 (2d Cir. 2004).

strayed from its own test in that case by focusing on the "general military nature of the complainant's employment" instead of "the challenged conduct itself." 373 F.3d at 98 (Pooler, J., concurring). And although he "reluctantly" agreed that the technician's claim was nonjusticiable under *Feres* in that case, *id.* at 99, he suggested that the application of *Feres* to dual-status technicians bringing suit under Title VII showed that *Feres* has been overextended, reaching matters "'far removed from core combat-related functions.'" *Id.* at 100 (quoting Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 Geo. Wash. L. Rev. 1, 34 (2003)).

This confusion among the circuits over the proper application of *Feres* to claims by dual-status technicians has, like the split over the meaning of § 10216(a)(1), proven to be outcome determinative, with some courts allowing Title VII claims to proceed, see *Laurent v. Geren*, Civ. No. 2004-0024, 2008 WL 4587290 (D.V.I. Oct. 10, 2008), and others, such as the Sixth Circuit, categorically barring such claims.

This Court's review and guidance is necessary to resolve these conflicts. The conflicts present a question of national importance, as they concern the availability of any remedy for employment discrimination for tens of thousands of dual-status technicians. And Wetherill's case presents the perfect vehicle to bring clarity to this area of the law. Petitioner properly exhausted all administrative remedies and timely filed suit in the district court. The lower courts' resolution of the issues presented by each of the splits over the application of *Feres* to dual-status technicians was necessary to the disposi-

tion of respondents' motions to dismiss. Accordingly, the Court should grant certiorari to resolve this entrenched division over a question of national importance.

II. The Court Should Grant Review To Clarify That The *Feres* Doctrine Does Not Bar Dual-Status Technicians From Suing For Discrimination Under Title VII.

This Court's review is also needed because the courts below reached the wrong outcome in this case. The Court should grant the writ to clarify that dual-status technicians are "civilian employee[s]" – as expressly stated by statute – and thus not subject to *Feres*. At a minimum, the Court should hold that claims of employment discrimination by dual-status technicians are not "incident to military service," and that *Feres* does not apply to such claims (even if it might apply to claims by dual-status technicians in other contexts).

A. The Court Should Give Effect To The Plain Statement In 10 U.S.C. § 10216(a) That Dual-Status Technicians Are "Civilians" For The Purpose Of "Any" Federal Law.

The courts below erred in denying effect to the plain language of 10 U.S.C. § 10216(a)(1), which expressly provides that dual-status technicians are "Federal civilian employee[s]" for purposes of "any . . . provision of law." Instead of adhering to black-letter rules of statutory construction, the courts below erroneously resorted to legislative history and deprived the statute of its clear and literal meaning.

"As in all cases involving statutory construction, [the] starting point must be the language employed by Congress." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (internal quotation marks and citations omitted). Moreover, when a clear statement by Congress conflicts with a common-law doctrine, the analysis should "start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (internal quotation marks and footnote omitted). Accordingly, courts should "conclude that federal common law has been preempted as to every question to which the legislative scheme [has] spoke[n] directly, and every problem that Congress has addressed." *In re Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981) (quoting *City of Milwaukee*, 451 U.S. at 315)) (internal quotation marks and citation omitted).

The application of these principles here is straightforward. Congress has spoken clearly about the civilian nature of dual-status technician positions in the 1997 National Defense Authorization Amendments ("NDAA"). There it said, "For purposes of [the NDAA] *and any other provision of law*, a military technician (dual status) is a Federal *civilian* employee." 10 U.S.C. § 10216 (emphases added);[2] see

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[2] In 1999, Congress reinforced the civilian classification of dual-status technicians by adding the term "civilian" to the requirement found in § 10216(a)(1)(C). See Pub. L. No. 106-65, § 521(a)(2), 113 Stat. 512 (1999) ("For the purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee who . . . (C) is assigned to a *civilian*

also 32 U.S.C. § 709(b) (stating that 10 U.S.C. § 10216 defines "military technician (dual status)").

The language "any other provision of law" indisputably portends a broad legislative sweep, as this Court and the courts of appeals have recognized. See, *e.g.*, *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2189 (2009) ("Of course the word 'any' (in the phrase 'any other provision of law') has an 'expansive meaning.'") (internal citation omitted); *United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (internal citation omitted); *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43, 49 (2d Cir. 2010) ("[That] the operative language begins with the phrase '[n]otwithstanding any other provision of law,' . . . mak[es] plain that the force of the section extends everywhere."); *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177, 1180 (9th Cir. 1998) ("[B]y using the expression 'any other provision of law' in the context it did here, Congress demonstrated its intent to encompass all law, whether it be statutory law, common law, or constitutional law."). The Federal Circuit correctly reached the same conclusion as to the use of these words in § 10216(a)(1), holding that the language was "broad and unambiguous." *Jentoft*, 450 F.3d at 1349.

The Eighth Circuit did not so find. Instead, it reached the flawed conclusion that "Congress did not

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position as a technician in the organizing, administering, instructing, or training of the Select Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces.") (emphasis added).

intend for the 1997 amendments to affect the application of [the *Feres*] doctrine to dual-status technicians." App. A, at 13a (citation omitted). Notwithstanding the plain language of the statute, the court looked to the NDAA's legislative history. The court reasoned that, because the statute's history lacked any mention of the *Feres* doctrine, the broad statutory language could not be given its plain meaning.

The court of appeals's analysis ran contrary to this Court's precedent. As the Court recently explained, the plain meaning of the phrase "any other provision of law" – as "a generally phrased residual clause" – is not undermined because a statute's legislative history fails to mention a particular provision of law. *Beaty*, 129 S. Ct. at 2191. Moreover, when presented with a clear legislative statement – as is the case here – the court should not resort to legislative history to discern Congress's intent. See *Ex parte Collett*, 337 U.S. 55, 61 (1949) ("[T]here is no need to refer to the legislative history where the statutory language is clear.").

The Eighth Circuit believed that it could ignore the plain text of the statute because Congress does not "'hide elephants in mouseholes.'" App. A, at 15a (quoting *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)). But the case from which that metaphor was drawn presented a statutory-construction argument that was the opposite of the one in this case: an interpretation of the Clean Air Act that had *no basis* in the text of the statute. See *Whitman*, 531 U.S. at 468. Here, Wetherill advanced an argument in harmony with statutory language.

Where statutory language is clear and unambiguous, only "the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on" that language. *Garcia v. United States*, 469 U.S. 70, 75 (1985) (internal quotation marks omitted); see also *Am. Tobacco*, 456 U.S. at 68 ("Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.") (internal quotation marks and citation omitted; alteration in original).

This is not such a case. The court of appeals found that the NDAA "addresses the details of obtaining funding for National Guard positions" and "eliminate[s] inconsistencies in the nomenclature used to refer to dual-status technicians." App. A, at 13a (internal quotation marks omitted). But the fact that these may have been among the goals Congress intended to achieve is not contrary to the statute's broad declaration that dual-status technicians are "civilian." A suggestion that statutory language has a broader effect than needed to accomplish the stated intent of Congress is not an "extraordinary showing" – a court may not ignore plain language simply because it believes "Congress may have painted with too broad a brush" or the plain, unambiguous language "has additional unintended consequences." *Olden v. LaFarge Corp.*, 383 F.3d 495, 505-06 (6th Cir. 2004) (citing *Brogan v. United States*, 522 U.S. 398, 403 (1998) ("[I]t is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy – even assuming that it is possible to identify

that evil from something other than the text of the statute itself.")).[3]

Because Congress spoke broadly and unequivocally in § 10216, the courts below erred in applying *Feres* (which by its own terms is limited to military personnel) to Wetherill, "a Federal civilian employee."

B. The Court Should Hold That The *Feres* Doctrine Does Not Apply To Dual-Status Technicians Alleging Discrimination Under Title VII.

Even if *Feres* applies to claims by dual-status technicians notwithstanding the language of 10 U.S.C. § 10216(a)(1), the court of appeals nonetheless erred in holding that *Feres* should apply in a case like this one – which alleges employment discrimination against a dual-status technician in the civilian sphere of her employment. The court concluded that such claims are "incident to military service" and therefore nonjusticiable under *Feres* because they potentially call into question military justifications for personnel decisions. But the core concerns underly-

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[3] Furthermore, Wetherill's case directly implicates Congress's purpose in declaring dual-status technicians to be "civilian employee[s]" – to secure their access to civilian benefits. See *Jentoft*, 450 F.3d at 1347 (explaining that the National Guard Technician Act deemed technicians "civilian" for the explicit purpose of ensuring that they qualified for retirement and fringe benefits). Wetherill's basic allegation is that Doohen, harboring discriminatory animus toward Wetherill, revoked her MRD waiver in order to prevent her from receiving full civilian benefits upon retirement.

ing the *Feres* doctrine are not implicated by employment-discrimination claims, and judicial refusal to consider such claims is contrary to clear congressional intent. Accordingly, the Court should hold that *Feres* does not apply to Wetherill's claims.

In *Feres*, this Court adopted a doctrine of intramilitary immunity, which holds tort claims by members of the military nonjusticiable where the claims arise out of conduct incident to military service. The Court has articulated a number of different rationales in support of this doctrine. In *Feres* itself, the Court noted three concerns: (1) that there did not exist, vis-à-vis service members' claim against the military, "parallel liability" of "private individuals" in the civilian context; (2) that, in light of the nomad-like existence of the active-duty soldier, it made no sense for the "geography of an injury" to determine "the law to be applied to his tort claims"; and (3) that Congress could not have intended for soldiers, who receive veteran's benefits in compensation for injuries sustained during service, to be granted an additional remedy under the FTCA. See *Feres*, 340 U.S. at 142-45. In subsequent cases, the Court offered a different rationale: judicial reluctance to interfere with the "peculiar and special relationship of the soldier to his superiors" or "sensitive military affairs" because of the potential harm to "military discipline and effectiveness." See *United States v. Johnson*, 481 U.S. 681, 690 (1987) (internal quotation marks and citation omitted); see also *United States v. Muniz*, 374 U.S. 150, 162 (1963) (identifying these

considerations as justifications for the *Feres* doctrine within the FTCA context).[4]

The application of these principles to military servicemembers based on injuries sustained on the battlefield is straightforward enough. Accidents and casualties are endemic to combat. Military decision-making thus "entails balancing, among other things, the demands of the mission with the safety of the individual service member and the safety of the unit." Major Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine,* 192 Mil. L. Rev. 1, 3-4 (2007). According to one *Feres* advocate, military leaders thus "cannot afford to cloud their decisions with issues of potential governmental or personal tort liability." *Id.* at 4.

But none of these policy concerns is implicated in the context of Title VII claims brought by dual-status technicians. The concerns set forth in *Feres* itself

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[4] It should be noted that the legitimacy of several of these rationales – even when applied to the FTCA context – has been the subject of much criticism. First, the actual existence of adverse effects on military discipline by "*Feres* suits" has "long been disputed." *Johnson*, 481 U.S. at 699 (Scalia, J., dissenting) (citing Barry Bennett, *The Feres Doctrine, Discipline, and the Weapons of War*, 29 St. Louis U. L.J. 383, 407-11 (1985)); see also Nicole Melvani, *The Fourteenth Exception: How the Feres Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members,* 48 Cal. W. L. Rev. 395, 422-31 (2010); Turley, *supra*, 71 Geo. Wash. L. Rev. at 17-18. Second, these rationales fail to respect or implement the text of the FTCA. *Johnson*, 481 U.S. at 699 (Scalia, J., dissenting); see also App. A, at 6a, n.5 (recognizing that *Feres* could have construed the FTCA differently).

plainly are not relevant. There is no absence of "parallel private liability" because Title VII expressly provides federal government employees – including employees of the military departments – with the same rights and remedies under Title VII as those afforded to "nonpublic parties." 42 U.S.C. § 2000e-16(d). Nor is there any legitimate concern about varying legal standards because Title VII is a federal law and thus consistent nationwide. And there is no risk of double compensation because the principal harm inflicted by employment discrimination is not a physical one and thus not compensable through veterans benefits.

The courts of appeals have nonetheless extended *Feres* to the Title VII context due to the other policy grounds cited by this Court – i.e., reluctance to interfere with the special relationship of the soldier to his superiors and a concern about harming military discipline and effectiveness. But these, too, are not put at risk by judicial review of employment discrimination claims by dual-status technicians. For one thing, the notion that any military value could be threatened is dubious, as illegal discrimination is not a legitimate tool of military order. In fact, the Department of Defense maintains a policy that expressly *prohibits* "discrimination based on race, color, religion, sex, national origin, mental or physical disability or age." Department of Defense Directive 1440.1 § 4.5 (emphasis added), *available at* http://prhome.defense.gov/nofear/docs/DoDDirective1440%201.pdf. If anything, allowing Title VII claims to proceed in this context would further, rather than undermine, military objectives. That is particularly true as to civilian employees, like dual-status technicians, who perform largely "collateral functions far

removed from core combat-related functions." *Overton*, 373 F.3d at 100 (Pooler, J., concurring) (citation and internal quotation marks omitted). In this respect, the roles of dual-status technicians exemplify a broader "shift in the military's general function" since *Feres* was originally decided. *Id.* Thus, *Feres*'s theoretical concerns about military readiness are not directly implicated by judicial cognizance of claims by these civilian personnel. Finally, any theoretical concern that such claims might adversely affect military discipline or effectiveness has been definitively disproven in practice, as the EEOC can and does review military Title VII claims brought by dual-status technicians, with no demonstrable effect on military order. See *Walch*, 533 F.3d at 304 (noting that *Feres* has no application to administrative agencies).

And regardless of the concerns underlying the *Feres* doctrine, holding technicians' Title VII claims to be nonjusticiable also contravenes congressional intent. In Title VII, Congress plainly declared that military departments are covered employers prohibited from certain types of discrimination: "All personnel actions affecting employees . . . *in military departments* . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a) (emphasis added). Significantly, Congress provided "aggrieved" employees of military departments an express remedy for redressing conduct violating Title VII. *Id.* § 2000e-16(c) ("[A]n employee . . . , if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action . . . ."). The statute provides the same remedies to military employees that it provides to private employees, see *id.* § 2000e-16(d), including the right to a

trial *de novo*, *Chandler v. Roudebush*, 425 U.S. 840 (1976). This legislative clarity simply places Title VII in a different category from the other areas of substantive law to which this Court has previously extended *Feres* – all of which concerned judicially-made doctrines, such as state tort law and *Bivens* claims. See *Chappell v. Wallace*, 462 U.S. 296, 301-04 (1983).

In light of these extensive differences between Title VII claims asserted by dual-status technicians and other types of claims previously held to be non-justiciable under *Feres*, it is no surprise that at least one court has held that employment discrimination that culminates in a civilian demotion for a technician is *not* conduct incident to military service. See *Laurent v. Geren*, Civ. No. 2004-0024, 2008 WL 4587290 (D.V.I. Oct. 10, 2008). In *Laurent*, a National Guard technician brought a sexual harassment claim under Title VII, complaining that various acts of discrimination culminated in the denial of her access to certain educational opportunities that would have benefited her civilian position. On these facts, the court stated that it was free to "question the rationale" behind the challenged conduct without "interfering with military decision-making." *Id.* at *4. The court held, moreover, that the plaintiff enjoyed Title VII protection because "[c]reating a sexually hostile environment is not integrally related to the military's mission." *Id.* at *3.[5]

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[5] Similarly, the Equal Employment Opportunity Commission ("EEOC"), as the agency commissioned with the interpretation and enforcement of Title VII, has indicated that dual-status technicians enjoy the protection of Title VII where the "the discriminatory action arises from

The Court should reach the same conclusion here. Neither Congress nor this Court has ever expressed an intent that employment discrimination complaints should be nonjusticiable simply because the complained of discrimination affects an employee of a military department. Indeed, Congress has expressly stated the opposite. Similarly, *Feres*'s nonjusticiability doctrine could not have been intended to reach discrimination against a "civilian employee" like Wetherill. The facts of this case demonstrate conclusively that the extension of *Feres* in this context has radically overshot the legitimate reach of its policy justifications. Accordingly, the Court should grant review to clarify this important area of the law and hold, consistent with congressional intent, that dual-status technicians may bring employment discrimination claims under Title VII.

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their capacity as civilian employees." *Johnson v. Wynne*, Appeal No. 0120063810, 2007 EEOPUB LEXIS 1761, at *3 (EEOC May 7, 2007). For example, the EEOC determined that Title VII applied in a case where a dual-status technician alleged a discriminatory act involving a demotion of the plaintiff's civilian position. *Brown v. Wynne*, Appeal No. 01A22198, 2007 EEOPUB LEXIS 1923, at *4 (EEOC May 16, 2007) ("The challenged action is complainant's [] demotion from one position to another, and it is clear from the positions' titles, that they are both [positions] . . . designated for federal civilian employees.").

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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November 9, 2010

Appendix

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 09-3334

Nancy J. Wetherill,
Plaintiff-Appellant,

v.

Pete R. Geren, Secretary of the Army; The Army National Guard; Steven R. Doohen, Brigadier General, in his official capacity as Adjutant General of the South Dakota National Guard; Theodore Johnson, Brigadier General, in his official capacity; and The South Dakota Army National Guard,
Defendants-Appellees.

Appeal from the United States District Court for the District of South Dakota.

Submitted: June 17, 2010
Filed: August 11, 2010

Before WOLLMAN, EBEL[1] and COLLOTON,

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[1] The Honorable David M. Ebel, United States Circuit

Circuit Judges.

EBEL, Circuit Judge.

This case requires us to determine whether the Feres doctrine, which generally bars judicial review of military decision-making, precludes us from hearing a Title VII suit brought by a "dual-status" National Guard technician, whose position was both military and civilian in nature. While Colonel Nancy Wetherill was initially granted a waiver of mandatory retirement from her military position, that waiver was later revoked. As a result, she was forced to quit her civilian position as a dual-status technician, and she was unable to obtain the full Civil Service pension attendant to the civilian aspect of that position. Wetherill brought suit under Title VII, alleging that the revocation of her military waiver constituted impermissible discrimination based on sex and/or national origin. The district court [2] dismissed the action, holding that Wetherill's complaint was non-justiciable under the Feres doctrine.

On appeal, Wetherill presses two arguments. First, she argues that the Feres doctrine does not apply at all to dual-status National Guard technicians, by operation of a 1997 amendment to 10 U.S.C. § 10216 addressing funding for such positions. Second, she argues that, even if Feres applies to dual-status technicians generally, the district court applied the improper standard to her case and thus prematurely dismissed her action. Exercising jurisdiction under 28

Judge for the Tenth Circuit, sitting by designation.

[2] The Honorable Karen E. Schreier, Chief Judge for the District of South Dakota, presiding.

U.S.C. § 1291, we AFFIRM the decision of the district court.

BACKGROUND

Nancy Wetherill is a Japanese-American woman.[3] She began working for the South Dakota Army National Guard in 1974, was commissioned as an officer on July 4, 1977, and was promoted to her highest rank of Colonel on July 1, 1999. As for the events giving rise to this litigation, Wetherill was employed as a "dual-status" National Guard technician, which meant that she was paid as a civilian employee under the Civil Service system, but her job required her at all times to be an officer of the National Guard, and she worked in uniform. See 10 U.S.C. § 10216(a); 32 U.S.C. § 709(b).

Under 10 U.S.C. § 14507(b), National Guard Colonels who have not been recommended for promotion to a higher rank are required to retire from the military after 30 years of service. This statute thus sets an officer's Mandatory Retirement Date ("MRD"). Wetherill's MRD was July 31, 2007. Under the regulations of the Civil Service Retirement System, however, Wetherill would not qualify for a full retirement annuity unless she continued working in her civilian capacity as a dual-status National Guard technician until December 31, 2010, which she could not do once she was retired from the military.

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[3] On review of the district court's grant of a motion to dismiss, we take all factual allegations in the complaint as true. Little Gem Life Sciences, LLC v. Orphan Medical, Inc., 537 F.3d 913, 917 (8th Cir. 2008).

Faced with this predicament, Wetherill asked Major General Michael A. Gorman, then the Adjutant-General[4] of the South Dakota Army National Guard, for a waiver of her MRD so that she could continue working until her Civil Service annuity matured. General Gorman granted this request on May 10, 2007, and his decision was approved by the National Guard on July 18 of that year. In September 2007, however, General Gorman retired, and Brigadier General Steven R. Doohen was appointed Adjutant-General of the South Dakota National Guard. In January 2008, General Doohen asked the National Guard to revoke the waiver given to Wetherill; in February, he informed Wetherill of this decision and that it was being made for "force management" reasons. (Apl't App. at 5 [Complaint ¶ 15].) The National Guard approved General Doohen's request, and Wetherill's MRD was re-set to July 31, 2008 (at this point, she was already serving beyond her original statutory MRD pursuant to the May 2007 waiver).

Wetherill believed that General Doohen's revocation of her MRD waiver was motivated by sex and/or national origin discrimination, and complained both informally and formally to the Office of Equal Opportunity and Civil Rights of the National Guard Bureau. Between May and July 2008, Wetherill was reassigned to a building where she worked in a room by herself, and was given work "that no Colonel would ever be required to perform." (Apl't. App. at 5-6 [Complaint ¶ 19].) According to Wetherill's complaint,

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[4] The Adjutant-General of a state's National Guard is the overall commander of that state's Guard. See 32 U.S.C. § 314.

no other technician in the South Dakota Army National Guard has had an MRD waiver revoked, and she is the only Asian-American female officer and the only woman to have served at her level in the South Dakota Army National Guard. Wetherill did indeed retire from the Guard on July 31, 2008, and thus had to relinquish her technician job as well. See 32 U.S.C. § 709(b) (requiring that dual-status technicians must "[b]e a member of the National Guard").

After her appeal was denied by the National Guard Bureau, Wetherill filed this action in the District of South Dakota against the Secretary of the Army, the Army National Guard, General Doohen and another general, and the South Dakota Army National Guard (collectively, "the Guard"), alleging discrimination and retaliation based on sex and/or national origin, in violation of Title VII. 42 U.S.C. § 2000e-2(a)(1) (barring discrimination "against any individual . . . because of such individual's race, color, religion, sex, or national origin . . . ."). All of the defendants moved to dismiss the complaint under a variety of theories. The district court granted the motions to dismiss, holding that Wetherill's complaint was nonjusticiable under the Feres doctrine, and thus that the court lacked subject-matter jurisdiction to hear the case. Wetherill v. Geren, 644 F. Supp. 2d 1135, 1142 (D.S.D. 2009). Wetherill timely appealed to this court. We review the district court's grant of a motion to dismiss for lack of subject-matter jurisdiction de novo. Ark. Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A., 551 F.3d 812, 816 (8th Cir. 2009).

DISCUSSION

I. Genesis and Development of the Feres Doctrine

In order to understand the gravamen of Wetherill's arguments on appeal, a brief detour is in order to assess the origins and history of the Feres doctrine. In Feres v. United States, 340 U.S. 135 (1950), the Supreme Court held that members of the armed forces who sustained injury while on duty due to the negligence of other servicemembers or the military itself could not sue the United States under the Federal Tort Claims Act ("FTCA"). The Court framed its decision in terms of statutory interpretation. While there was no language in the FTCA expressly excluding servicemember claims against the military—and indeed, some of the statutory language could have been construed as implicitly endorsing such liability[5]—the Court nevertheless interpreted the statute in concert with "the entire statutory system of remedies against the Government." Id. at 139. In the

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[5] For example, the FTCA expressly included within "employee[s] of the Government" whose actions could give rise to liability "members of the military or naval forces of the United States." See Feres, 340 U.S. at 138 (quoting 28 U.S.C. § 2671). And the FTCA explicitly excluded injuries suffered by soldiers "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during times of war." Id. (quoting 28 U.S.C. § 2680(j)) (emphasis omitted). Thus the language of the statute could have been construed to reach injuries incurred not during time of war and not arising out of combatant activities (such as the accidental injuries sustained by the parties in Feres). See id.

Court's view, the FTCA was a narrow exception to the otherwise prevailing norm of sovereign immunity. Congress enacted the statute in order to "transfer[] the burden of examining tort claims to the courts," and thus stem the "steadily increas[ing]" tide of private bills in Congress demanding relief for individuals who had suffered harm at the hands of the government. Id. at 140. But, the Court noted, "Congress was suffering from no plague of private bills on the behalf of military and naval personnel, because a comprehensive system of relief had been authorized for them and their dependents by statute." Id. Thus, in the Court's view, compensation for harms suffered by servicemembers while on duty was not within Congress' purpose in passing the FTCA.

The Court then turned to the language of the FTCA providing the test for liability: "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." Id. at 141 (quoting 28 U.S.C. § 2674). This test did not create a new species of liability; it merely adopted the standards of tort law as applied to private individuals. And because "[w]e know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving," the petitioners in the case could point to no analogous circumstance that a private individual might face that would give rise to liability; private individuals, after all, cannot maintain armies. Id. Thus, the FTCA could not create liability in the United States for a harm which no private party could inflict under tort law.

In reaching its conclusion, the Court

distinguished one of its earlier precedents, Brooks v. United States, 337 U.S. 49 (1949), in a manner that sheds light on the governing standard under Feres. In Brooks, a soldier who was injured when a government-owned and -operated vehicle collided with a car in which he was a passenger, was allowed to recover from the United States under the FTCA. Feres, 340 U.S. at 146. Brooks could do so, however, only because he had been on furlough at the time of the accident: "[t]he injury to Brooks did not arise out of or in the course of military duty." Id. at 146. In contrast, Feres was killed when his barracks caught on fire while he was on active duty. Id. at 137. According to the Court, the federal government cannot be liable under the FTCA "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Id. at 146 (emphasis added).

In a later case, Chappell v. Wallace, 462 U.S. 296 (1983), the Supreme Court further articulated the policy basis of Feres and its progeny. Underlying Feres was a recognition of "the peculiar and special relationship of the soldier to his superiors, [and] the effects on the maintenance of [FTCA] suits on discipline." Id. at 299 (quoting United States v. Muniz, 374 U.S. 150, 162 (1963) (internal quotation marks omitted)). The Court counseled that "[c]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment." Id. at 300. Thus the Court in Chappell extended the reasoning of Feres to bar suits by soldiers against their superiors

for violation of constitutional rights under Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (creating a cause of action for injuries sustained due to unconstitutional actions of federal agents). Chappell, 462 U.S. at 305.

The courts of appeals have extended Feres to encompass Title VII claims by servicemembers against the military. While the text of Title VII makes its strictures applicable to "employees . . . in military departments," 42 U.S.C. § 2000e-16(a), that provision has generally been interpreted to apply only to civilian employees of the armed forces. Johnson v. Alexander, 572 F.2d 1219, 1224 (8th Cir. 1978) ("[N]either Title VII nor its standards are applicable to persons who enlist or apply for enlistment in any of the armed forces of the United States."); see also 29 C.F.R. § 1614.103(d)(1) (EEOC regulation noting that Title VII applies to "military departments," but not to "[u]niformed members of the military departments"). Thus, as a general rule, the Feres doctrine precludes claims brought by servicemembers under Title VII arising out of activities that are incident to military service. See Hupp v. U.S. Dep't of the Army, 144 F.3d 1144, 1147 (8th Cir. 1998); see also, Overton v. N.Y. State Div. of Military and Naval Affairs, 373 F.3d 83, 89 (2d Cir. 2004); Brown v. United States, 227 F.3d 295, 299 (5th Cir. 2000); Mier v. Owens, 57 F.3d 747, 749-50 (9th Cir. 1995). The Feres doctrine also generally applies to members of the National Guard, as well as members of the regular military. Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 667 n.1, 672, 673-74 (1977) (applying Feres to block a third-party indemnity claim against the United States over the death of a National Guard officer); see also

Hupp, 144 F.3d at 1147.

II. The Feres Doctrine Applies to Dual-Status National Guard Technicians

Notwithstanding the unquestioned applicability of the Feres doctrine to servicemembers generally, Wetherill argues that we should not apply the doctrine to her position—dual-status National Guard technician—specifically. This argument springs from the text of 10 U.S.C. § 10216, which provides:

> (a) In general. — (1) For purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee who—
>
> (A) is employed under section 3101 of title 5 or section 709(b) of title 32[6];
>
> (B) is required as a condition of that employment to maintain membership in the Selected Reserve; and
>
> (C) is assigned to a civilian position as a technician in the organizing, administering, instructing, or training of the Selected Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces.

This provision was enacted as part of the National Defense Authorization Act for Fiscal Year 1998, Pub. L. 105-85, 111 Stat. 1629, 1734-35 (1997).[7] The

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[6] 32 U.S.C. § 709(b) is the applicable provision governing Wetherill's dual-status civilian employment.

[7] 10 U.S.C. § 10216 was first enacted as part of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106,

essence of Wetherill's argument is that § 10216 establishes that dual-status technicians are "Federal civilian employee[s]" "[f]or purposes of . . . any other provision of law," which, she argues, would include Title VII (emphasis added). In her view, then, § 10216 renders her position civilian, rather than military, and thus the Guard should be amenable to her Title VII suit notwithstanding the Feres doctrine.[8]

In support of this argument, Wetherill points to Jentoft v. United States, 450 F.3d 1342 (Fed. Cir. 2006). In that case, the Federal Circuit considered the

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110 Stat. 186, 306 (1996). Subsection (a), which is the provision at issue in this case, was added as part of the 1997 amendments referenced above.

[8] As a preliminary matter, we note that Hupp, in which we applied the Feres doctrine to bar a Title VII claim brought by a dual-status National Guard technician, was decided approximately six months after the enactment of the current version of § 10216. We did not consider the effect of the newly-amended statute in Hupp, and, indeed, in that case, the plaintiff "acknowledge[d] that employment decisions concerning a National Guard civilian technician's military qualifications are non-justiciable under the Feres doctrine." Hupp, 144 F.3d at 1147.

As a general proposition, "when an issue is not squarely addressed in prior case law, we are not bound by precedent through stare decisis." Passmore v. Astrue, 533 F.3d 658, 660 (8th Cir. 2008) (citing Brecht v. Abrahamson, 507 U.S. 619, 630-31 (1993)); see also Webster v. Fall, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."). Given that we are here reaffirming the applicability of the Feres doctrine to dual-status National Guard technicians, we need not address the finer points of the stare decisis force of the parties' concession to that effect in Hupp.

interaction of § 10216 and the Feres doctrine in the context of an Equal Pay Act claim, and came out on Wetherill's side of the question. For the Federal Circuit, the plain language of the statute—that a dual-status technician is "a Federal civilian employee" for the purposes of "any other provision of law"—was sufficient to indicate Congress' purpose to remove dual-status technicians from the ambit of judge-made doctrines such as Feres. Jentoft, 450 F.3d at 1348 ("[T]here is no language in § 10216(a) limiting the circumstances in which a dual status technician can be considered a federal civilian employee."). Given "the broad and unambiguous language contained in" the statute, the Federal Circuit believed that application of Feres to dual-status technicians was effectively foreclosed by the actions of Congress. Id. at 1349 (noting that Congress has the ultimate authority to regulate the military system of justice).

However, two of our sister circuits have considered and rejected the reasoning of Jentoft. In Walch v. Adjutant General's Dep't. of Texas, 533 F.3d 289 (5th Cir. 2008), the Fifth Circuit reaffirmed its precedent that the Feres doctrine applies to dual-status National Guard technicians, notwithstanding the 1997 amendments to 10 U.S.C. § 10216. That court began by noting that the operative language of § 10216 "refer[s] to technicians' civilian status as an introduction to provisions primarily concerned with the annual requests to Congress for authorizing specific numbers of technician positions." Walch, 533 F.3d at 299. This statutory language classifying dual-status technicians was, in the Fifth Circuit's view, "nothing new." Id. Indeed, the court observed that the 1997 amendments to § 10216 had not made dual-

status technicians federal civilian employees; rather, "[t]he 1968 National Guard Technician Act [which created the position of dual-status technician in the first place] did that." Id. at 300. In sum, the Fifth Circuit did not believe that Congress had intended "a doctrinal revolution" in amending § 10216 in 1997, and thus held that Feres continued to apply. Id.

The Ninth Circuit picked up and expanded upon this line of reasoning, while rejecting the conclusion of the Jentoft court, in Zuress v. Donley, 606 F.3d 1249 (9th Cir. 2010).[9] The Zuress court examined the legislative history of the 1997 amendments to § 10216 and discovered that "the provisions at issue appear to have been primarily concerned with distinguishing between dual status and non-dual status technicians and with annual requests to Congress for authorization of different categories of technicians." 606 F.3d at 1255. The "any other provision of law" language relied upon by Wetherill and the Jentoft court, in the Ninth Circuit's view, was added to the statute in 1997 merely to "eliminate inconsistencies in the nomenclature used to refer to dual status technicians, rather than to override settled case law on intra-military immunity," such as the Feres doctrine. Id. (citing H.R. Rep. No. 105-132, at 358 (1997) ("The National Defense Appropriations Act for Fiscal Year 1996 . . . and the National Defense Authorization Act for Fiscal Year 1996 . . . enacted provisions defining the term 'military technician' which were not completely consistent with

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[9] The plaintiff in Zuress was a dual-status Air Reserve technician, rather than a dual-status National Guard technician, but the statutory provisions at issue are the same. 606 F.3d at 1250.

one another. This section would remove the inconsistencies . . . ."). In light of this explanation for the "any other provision of law" language and the lack of any mention of Title VII or the Feres doctrine in the legislative history, the Zuress court concluded that Congress did not intend for the 1997 amendments to affect the application of that doctrine to dual-status technicians. Id.

We are more persuaded by Walch and Zuress than by Jentoft, and thus join the Fifth and Ninth Circuits in holding that the 1997 amendments to 10 U.S.C. § 10216 do not remove dual-status National Guard technicians from the strictures of the Feres doctrine. Like the Fifth Circuit, we had acknowledged the hybrid military-civilian nature of dual-status technicians prior to the 1997 amendments to § 10216. See Wood v. United States, 968 F.2d 738, 739 (8th Cir. 1992). Our recognition of the civilian aspect of the dual-status technician positions has given us no pause in applying the Feres doctrine to the military aspects of that position. See id. at 740; see also Hupp, 144 F.3d at 1147; Uhl v. Swanstrom, 79 F.3d 751, 756 (8th Cir. 1996). Thus, as the Fifth Circuit noted, the recognition in the 1997 amendments that dual-status technicians are federal civilian employees—albeit civilian employees which had as a condition of their employment that they remain members of the armed services—was indeed "nothing new." Moreover, the Ninth Circuit's analysis in Zuress provides a convincing justification for the reference in the 1997 amendments to "any other provision of law"; this language was designed to harmonize the nomenclature to be used for dual-status technicians throughout the U.S. Code. See Zuress, 606 F.3d at

1255.

Indeed, it would have been odd for Congress fundamentally to alter the legal condition of dual-status technicians in 10 U.S.C. § 10216, a statute that overwhelmingly just addresses the details of obtaining funding for National Guard positions, see, e.g., 10 U.S.C. §§ 10216(b) ("As a basis for making the annual request to Congress . . . ."); (c) ("The Secretary of Defense shall include as part of the budget justification documents . . . ."); (e) ("Funds appropriated for the Department of Defense . . . ."), rather than in 32 U.S.C. § 709, which defines the position of dual-status technician and lays out who may and may not occupy such a position. In the words of the Fifth Circuit in Walch, such an action would have created a "doctrinal revolution," which has gone unnoticed by every court other than the Federal Circuit in Jentoft. Walch, 533 F.3d at 300. And, as the Supreme Court has observed, Congress "does not, one might say, hide elephants in mouseholes." Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001). This particular elephant—opening the National Guard to lawsuits by any dual-status technician under any federal statute—is simply too big for the mousehole that is 10 U.S.C. § 10216.

In sum, then, we reject the reasoning of the Federal Circuit in Jentoft, join the Fifth and Ninth Circuits, and reaffirm our own circuit precedent that the Feres doctrine may be applied to dual-status National Guard technicians, notwithstanding the 1997 amendments to 10 U.S.C. § 10216.

III. The District Court Correctly Dismissed Wetherill's Claim Under the Feres Doctrine

With the question of the applicability of the Feres doctrine to dual-status National Guard technicians settled in the affirmative, we now turn to whether the district court correctly dismissed Wetherill's Title VII claims for lack of subject-matter jurisdiction. En route to dismissing Wetherill's claims, the district court considered a number of different standards used by different circuits for dismissal of a case under the Feres doctrine. Wetherill, 644 F. Supp. 2d at 1140-41 (noting standards such as "involves an assessment of military qualifications," "integrally related to the military's unique structure," and "irreducibly military in nature"). In the end, however, the district court concluded that "[u]nder any of these analyses used by various courts of appeal, Wetherill's Title VII claims are barred." Id. at 1141.

Here, Wetherill argues, the district court erred. In her view, the district court should have exclusively considered the Feres standard laid out by this court in Hupp, which is to say that the disposition of her claim should have turned on whether the challenged decision "involved an assessment of a technician's military qualifications." Hupp, 144 F.3d at 1148. Moreover, Wetherill argues that the district court answered that question prematurely; noting that the Hupp court relied upon a sworn statement produced during discovery in making its decision, Wetherill argues that the district court should have denied the motion to dismiss, allowed discovery to proceed, and adjudicated the Feres issue on a motion for summary

judgment.

We disagree on both counts. First, despite Wetherill's arguments to the contrary, the Hupp court did not purport to set out the "involves an assessment of military qualifications" test as a standard to be applied to all Feres doctrine challenges. Hupp cited three prior cases—Uhl, Wood, and Watson—for its "assessment of military qualifications" language. Hupp, 144 F.3d at 1148. That language, however, did not appear in Watson, originated in Wood, and was quoted only parenthetically in Uhl. Wood, 968 F.2d at 740 ("The nature of the pleaded claim, judicial review of a discrete intraservice personnel decision which decision involves, as it does, an assessment of an individual's military qualifications for command responsibilities . . . is nonjusticiable . . . ."); see also Uhl, 79 F.3d at 755 (citing Wood); Watson v. Ark. Nat'l Guard, 886 F.2d 1004, 1010 (8th Cir. 1989) (observing that claims requiring "a fact-specific inquiry into an area affecting military order and discipline" implicate the Feres doctrine).

This is not to criticize either the Hupp court or the district court here in using the "involves an assessment of military qualifications" language. Rather, it merely goes to show that that language was not meant by any prior panel of this court to be a one-size-fits-all test for all Feres claims. Under the facts of Hupp and Wood, the court there looked to whether the challenged decisions involved an assessment of military qualifications because, in both cases, the technicians challenged the Guard's decision not to promote them to a particular position. Hupp, 144 F.3d at 1145 (challenging decision not to promote Hupp

from Detachment Sergeant to Support Services Supervisor); Wood, 968 F.2d at 739 (challenging failure to assign Wood to position of Air Commander). In such a case, inquiring into what informed the decision not to promote would be essential to deciding whether Feres was implicated. It does not follow, however, that every Feres case will turn on whether the challenged decision involved an assessment of military qualifications.

In any event, we are not persuaded that these various standards of Feres are inconsistent, or reflect anything more than the unique facts and claims presented by the parties in those particular cases. At its core, the standard to be applied by this court to determine whether a particular claim is barred under the Feres doctrine is, quite simply, the standard articulated in Feres itself: Did the injury complained of arise out of or occur in the course of activity incident to military service? Feres, 340 U.S. at 146. To ask whether a decision involved an assessment of military qualifications, Hupp, 144 F.3d at 1148, or whether the conduct was "integrally related to the military's unique structure," Luckett v. Bure, 290 F.3d 493, 499 (2d Cir. 2002), or whether the position at issue is "irreducibly military in nature," Fisher v. Peters, 249 F.3d 433, 441 (6th Cir. 2001), is only to ask, as applied to a particular set of facts or a particular legal claim, whether the injury was incident to military service. The Hupp and Wood courts did not intend their language to be regarded as magic words for all Feres cases; rather, those words were merely the most efficient tool for excavating the underlying question of whether the injury was incident to military service.

Of course, since the operative test is whether the injury arose out of activity incident to military service, it is conceivable that a dual-status technician might suffer an injury purely as a civilian that could give rise to a justiciable claim against the Guard as employer. Such a case would be a descendant of Brooks, where the Supreme Court held that a soldier's accidental death due to military negligence while off duty gave rise to a justiciable FTCA claim against the United States. Brooks, 337 U.S. at 50, 54 (cited in Feres, 340 U.S. at 146). While at least one of our sister circuits apparently has held that dual-status technicians are "irreducibly military in nature" such that they can never have a claim against the Guard, Fisher, 249 F.3d at 441, 443, we decline to adopt such a categorical rule. Accord Overton v. N.Y. State Div. of Military and Naval Affairs, 373 F.3d 83, 95 (2d Cir. 2004) (abjuring a categorical rule for all dual-status technicians); Brown v. United States, 227 F.3d 295, 299 (5th Cir. 2000) (same); Mier v. Owens, 57 F.3d 747, 750 (9th Cir. 1995) (same). Because Title VII applies to civilian employees of military departments, dual-status technicians could theoretically suffer an employment injury not incident to military service, and thus maintain a justiciable suit under Title VII against the Guard.

This is not such a case, however.

With the legal landscape now explored, we finally turn to whether the district court correctly dismissed Wetherill's Title VII claims without further discovery. In Wetherill's complaint, which we must take as true for the purpose of reviewing a dismissal, she stated that her Guard superiors told her they were

revoking her MRD waiver for "force management reasons." (Apl't App. at 5 [Complaint ¶ 15].) To be sure, she claimed that the proffered reason was mere pretext for discrimination, (Id. at 6 [Complaint ¶ 23] ("The reasons given for the revocation of Plaintiff's MRD were pretextual in nature.")), but that does not change the fact that Wetherill herself informed the district court in her complaint that the Guard claimed a military motive for its actions. Moreover, in identifying her injury more specifically, Wetherill complained that she was given work "that no Colonel would ever be required to perform." (Id. at 6 [Complaint ¶ 19].) This may have been humiliating to her, to be sure, but her very claim identifies as the source of that humiliation her military rank of Colonel. Wetherill's own factual allegations in her complaint situate this case in the heartland of the Feres doctrine.

Even if she had not identified these military bases for her injury, however, the very premise of Wetherill's lawsuit belies any claim that her injuries were not incident to military service. The essential core of Wetherill's complaint is that the Guard discriminatorily revoked her MRD waiver, which required her to retire from the Guard, which then caused her to lose her civilian position. See 32 U.S.C. § 709(b)(2) (requiring dual-status technicians to "[b]e a member of the National Guard"). But the MRD waiver and its revocation related exclusively to her military position—the effect on her civilian position was purely secondary and incidental, and occurred only due to the operation of § 709. Thus Wetherill's is precisely the opposite of a case where a dual-status technician might have a claim against the Guard under Title VII. The action she complained of was purely military,

rather than purely civilian, in nature, even though that military action happened to have some civilian consequences.

Thus, the district court did not err in dismissing Wetherill's claim under the Feres doctrine without further discovery, because the allegations laid out in Wetherill's complaint made the applicability of Feres to her claims an open-and-shut case.

CONCLUSION

We conclude that the Feres doctrine applies to dual-status National Guard technicians notwithstanding the 1997 amendments to 10 U.S.C. § 10216. Further, we reassert that the standard for determining whether Feres renders a suit nonjusticiable is whether the injuries complained of arise out of or occur in the course of activity incident to military service; under that standard, the district court did not err in dismissing Wetherill's claims.

The judgment of the district court is therefore AFFIRMED.

United States Court of Appeals
For The Eighth Circuit
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August 11, 2010

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RE: 09-3334 Nancy Wetherill v. Pete Geren, etc., et al

Dear Sirs:

A published opinion was filed today in the above case.

Counsel who presented argument on behalf of the appellant was Sarah E. Baron Houy, of Rapid City, SD.

Counsel who presented argument on behalf of Appellees Doohen, Johnson, and The SD Army National Guard was Robert Bruce Anderson, of Pierre,

SD. Counsel who presented arfument on behalf of Appellees Geren and The Army National Guard was Daneta Wollmann, AUSA. of Rapid City, SD.

The judge who heard the case in the district court was Honorable Karen E. Schreier. The judgment of the district court was entered on July 31, 2009.

If you have any questions concerning this case, please call this office.

Michael E. Gans
Clerk of Court

MER

Enclosure(s)

cc: Lois Law
MO Lawyers Weekly

District Court/Agency Case Number(s):
5:08-cv-05077-KES

United States Court of Appeals
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August 11, 2010

Ms. Sarah E. Baron Houy
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333 West Boulevard
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Rapid City, SD 57701-0000

RE: 09-3334 Nancy Wetherill v. Pete Geren, etc., et al

Dear Counsel:

The court today issued an opinion in this case. Judgment in accordance with the opinion was also entered today.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be

received in the clerk's office within 45 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. No grace period for mailing is allowed, and the date of the postmark is irrelevant, for pro-se-filed petitions. Any petition for rehearing or petition for rehearing en banc which is not received within the 45 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans
Clerk of Court

MER

Enclosure(s)

cc: Mr. Robert Bruce Anderson
Mr. Joseph A. Haas
Mr. Michael Martin Hickey
Ms. Daneta Wollmann

District Court/Agency Case Number(s): 5:08-cv-05077-KES

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

Civ. 08-5077-KES

NANCY J. WETHERILL
Plaintiff,

vs.

PETE R. GEREN, Secretary of the Army; THE ARMY NATIONAL GUARD; STEVEN R. DOOHEN, Brigadier General, in his official capacity as Adjutant General of the South Dakota National Guard; THEODORE JOHNSON, Brigadier General, in his official capacity; and THE SOUTH DAKOTA NATIONAL GUARD,
Defendants.

Order Granting Motions to Dismiss

Plaintiff, Nancy Wetherill, brought this action alleging discrimination based on her gender and on race and national origin. Defendants Steven Doohen, Theodore Johnson, and the South Dakota National Guard move to dismiss. Defendants Pete Geren and

the Army National Guard move to dismiss. For the reasons stated below, both motions are granted.

FACTUAL BACKGROUND

Wetherill joined the Army National Guard in 1974 and was commissioned on July 4, 1977. From 1982 to 2008, Wetherill served in Rapid City, South Dakota, as a full-time military technician. On July 1, 1999, she achieved the rank of colonel, and on April 1, 2007, Wetherill became the Director of Operations, Military Technician, for the South Dakota Army National Guard.

Under 10 U.S.C. § 14507(b), a colonel is removed from active status the first day of the month after the month in which the officer completes 30 years of commissioned service. According to this statute, Wetherill's Mandatory Removal Date (MRD) was July 31, 2007. In May 2007, Major General Michael A. Gorman, who was at the time Adjutant General of the South Dakota Army National Guard, submitted a request to the National Guard Bureau (NGB) that Wetherill's MRD be extended to December 30, 2010. That is the date on which Wetherill could have received full annuity payments under the Civil Service Retirement System; an earlier MRD would mean that she would collect a reduced annuity payment. On July 18, 2007, NGB approved this request. Shortly thereafter, Major General Gorman retired as Adjutant General and was replaced by Brigadier General Steven Doohen.

On January 23, 2008, Adjutant General Doohen asked the NGB to revoke the MRD extension

previously granted to Wetherill and to recognize April 30, 2008, as her new MRD. On February 2, 2008, Brigadier General Theodore Johnson and Colonel Dennis Flanery informed Wetherill that on April 30, 2008, she would be terminated from her military technician position for "force management" reasons. Then, Adjutant General Doohen stayed Wetherill's MRD from April 30, 2008, to July 31, 2008. On February 5, 2008, the NGB granted Adjutant General Doohen's request to revoke Wetherill's previous MRD and held that the "effective date of separation is 31 July 2008." Docket 1 ¶ 17. Wetherill protested the modification of her MRD and made allegations of gender and racial discrimination, all to no avail. On May 8, 2008, Wetherill was given a new work assignment, which she claims involved work that was "intended to be performed by persons holding a rank lower than Colonel." This new assignment also forced her to work by herself in an isolated building. Ultimately, Wetherill was terminated from her military technician position on July 31, 2008.

Wetherill states that she was the only female Asian-American officer in the South Dakota Army National Guard and was the only female in the South Dakota Army National Guard "to have served at the 06 level in a non-special branch." Id. ¶ 22. Finally, Wetherill claims that "[n]o other technician in the South Dakota Army National Guard has ever been denied the opportunity to receive an unreduced annuity as a result of having an MRD waiver being denied, modified or revoked." Id. ¶ 20.

Wetherill's complaint states that the decision to revoke her MRD waiver was due to discrimination

based on her gender, race, and national origin, and that the act of moving Wetherill to a different work station in May 2008 was in retaliation for her complaints of discrimination. Because of defendants' discrimination, Wetherill alleges that she was deprived of receiving a full retirement annuity, future promotions, and substantial pay increases, and she suffered humiliation, embarrassment, and shame.

STANDARD OF REVIEW

Rule 12(b)(6) requires the court to review only the pleadings to determine whether they state a claim upon which relief can be granted. In considering a motion to dismiss, the court assumes all facts alleged in the complaint are true, construes the complaint liberally in the light most favorable to the plaintiff, and should dismiss only if "it appears beyond a doubt that the plaintiff can prove no set of facts which would entitle the plaintiff to relief." Coleman v. Watt, 40 F.3d 255, 258 (8th Cir. 1994). "The issue is not whether a claimant will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974), overruled on other grounds by Davis v. Scherer, 468 U.S. 183, 191, 104 S. Ct. 3012, 3017, 82 L. Ed. 2d 139 (1984).

Defendants also assert that this action should be dismissed under Rule 12(b)(1) for lack of subject-matter jurisdiction. "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the

federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (citations omitted). Because Wetherill brings this suit under 42 U.S.C. § 2000e, which grants federal courts jurisdiction over discrimination suits such as this one, the court concludes that the motion to dismiss is properly evaluated under Rule 12(b)(6), and not as one for lack of subject-matter jurisdiction. See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (stating that there is subject-matter jurisdiction "if the right of the petitioners to recover under the complaint will be sustained" if there is a dispute as to the construction of federal law); see also Wood v. United States, 968 F.2d 738, 739 (8th Cir. 1992) (affirming dismissal of discrimination suit of National Guard airman for failure to state a claim under 12(b)(6)).

DISCUSSION

Defendants argue that Wetherill's claims should be dismissed because they are nonjusticiable under the doctrine established in Feres v. United States, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950). Defendants further contend that the court lacks subject matter jurisdiction because Title VII does not extend to military personnel. Finally, because Feres and its progeny bar civil suits by military members against the armed services, the state defendants argue that the Eleventh Amendment prohibits Wetherill's claims against them.

In response, Wetherill states that dismissal at this stage would be inappropriate, "because it remains to be seen whether or not the challenged conduct in this case involved 'an assessment of [Wetherill's] military qualifications.' " Docket 15, page 7 (citing Hupp v. United States, 144 F.3d 1144, 1148 (8th Cir. 1998)). Therefore, argues Wetherill, the court is unable to evaluate whether, under Eighth Circuit precedent, her Title VII claim is nonjusticiable. Discovery, she claims, will reveal that the challenged conduct was not based on consideration of military qualifications, rendering them reviewable by this court.

In Feres v. United States, the United States Supreme Court found that military service members could not bring negligence suits against the military. 340 U.S. at 146. Noting the unique relationship between the military and its members, the Court concluded that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Id. at 146. In a subsequent case, the Supreme Court reiterated the rationale of Feres: "Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment." Chappell v. Wallace, 462 U.S. 296, 299, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983). Courts have expanded the scope of the Feres rationale to shield the military from Bivens actions and liability under 42 U.S.C. § 1983. See, e.g., United States v. Stanley, 483 U.S. 669,

684, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987) (Bivens action); Watson v. Arkansas Nat'l Guard, 886 F.2d 1004, 1008 (8th Cir. 1989) (stating that the concern for "disruption of military discipline upon which Feres, Chappell, and Stanley are based applies equally when a court is asked to entertain an intra-military suit under § 1983"). Consequently, "[t]he permissible range of lawsuits by members of the service against their superior officers 'is at very least, narrowly circumscribed.' " Wood v. United States, 968 F.2d 738, 739 (8th Cir. 1992) (citation omitted).

The availability of Title VII of the Civil Rights Act of 1964 to military service members is similarly hindered. Title VII waived state's sovereign liability in the context of discrimination claims "affecting employees . . . in military departments." 42 U.S.C. § 2000e-16(a). As discussed further below, however, courts have generally interpreted this waiver as applying only to civilian employees of military departments, not to members of the armed forces. Johnson v. Alexander, 572 F.2d 1219, 1224 (8th Cir. 1978) (stating that "neither Title VII nor its standards are applicable to persons who enlist or apply for enlistment in any of the armed forces of the United States"); see also Brown v. United States, 227 F.3d 295, 298 n.3 (5th Cir. 2000) (surveying circuit courts adopting the same position); Bryant v. Dep't of Defense, Inspector General, 2008 WL 1699620, *3 (D. Minn. Apr. 9, 2008).

Wetherill is a member of the National Guard. National Guard military technicians, such as Wetherill, occupy a "dual status" position, which the Eighth Circuit has described as "hybrid." Wood v.

United States, 968 F.2d 738, 739 (8th Cir. 1992). While military technicians are described by statute as "civilian" positions, individuals holding those positions must also be members of the National Guard. Id.; 10 U.S.C. § 10216(a) (stating that "a military technician (dual status) is a Federal civilian employee who– . . . (B) is required . . . to maintain membership in the Selected Reserve"). With regard to the availability of Title VII to National Guard military technicians like Wetherill, the hybrid nature of the position "renders it susceptible to the doctrine restricting review of military decision-making," raising "justiciability concerns." Wood, 968 F.2d at 739.

In Hupp v. United States, 144 F.3d 1144 (8th Cir. 1998), the Eighth Circuit examined a claim of discrimination from a National Guard military technician that is similar to Wetherill's complaints here. In Hupp, the plaintiff conceded that the Feres doctrine would bar challenges to employment decisions that concerned the military technician's "military qualifications." Id. at 1147. Wetherill makes a similar concession. Docket 15, page 6 (admitting that dismissal may be appropriate if discovery were to reveal that the challenged conduct was based on an assessment of her military qualifications). With regard to challenges to decisions made about a military technician's civilian position, however, the Eighth Circuit in Hupp assumed without deciding that Title VII may apply, and went on to find that because the National Guard's conduct here "included consideration of both military and civilian qualifications," it was nonjusticiable under Feres. Hupp, 144 F.3d at 1148 (stating that the hiring issue involved an "assessment of military qualifications," implicating Feres); see also

Kearsley v. Brownlee, 2004 WL 256711, *2 (D. Minn. Feb. 10, 2004) (finding no jurisdiction when "selection and retention decisions" regarding military technicians were based "at least in part, upon a consideration of the ability to perform the ALSE tasks in a military capacity" and when his civilian and military duties were intertwined and implicated the "military's unique structure").

Some courts of appeal have similarly acknowledged that there may be liability under Title VII for some decisions that involve the purely civilian aspects of the position of National Guard military technician. Walch v. Adjutant General's Dep't of Texas, 533 F.3d 289, 299 (5th Cir. 2008) (stating that "claims that were solely a result of the civilian position would be justiciable"); Luckett v. Bure, 290 F.3d 493, 499 (2d Cir. 2002) (stating that Title VII applies to National Guard dual-status employees "except when the challenged conduct is integrally related to the military's unique structure"); Mier v. Owens, 57 F.3d 747 (9th Cir. 1995) (holding that "Title VII coverage . . . encompasses actions brought by Guard technicians except when the challenged conduct is integrally related to the military's unique structure"); Laurent v. Geren, 2008 WL 4587290, *3 (D. Virgin Is. Oct. 10, 2008) (denying motion to dismiss and finding that creating a "sexually hostile environment is not integrally related to the military's mission" and that discriminatory conduct may be actionable because it "affected Laurent in her capacity as a civilian"). Other circuits have found that military technicians are "irreducibly military in nature," and, therefore, civil suits are always nonjusticiable under Feres and its progeny. Fisher v. Peters, 249 F.3d 433, 443 (6th Cir.

2001) (Title VII); see also Wright v. Park, 5 F.3d 586, 588-89 (1st Cir. 1993) (Bivens action) (finding that National Guard technicians' positions are "military in nature" because they "are encompassed within a military organization and require the performance of work directly related to national defense").

Under any of these analyses used by various courts of appeal, Wetherill's Title VII claims are barred. The decisions of the National Guard and its employees with regard to Wetherill's MRD are undeniably military in nature. Under 10 U.S.C. § 14507, which discusses removal from military active status, Wetherill's Mandatory Removal Date (MRD) was set for July 31, 2007. The National Guard Bureau both extended her MRD and then retracted that extension. While her removal from active-status compromised her civilian employment at that time, the action taken by defendants was a military personnel management decision, because it only involved her military status and it was not solely related to her civilian employment. See 32 U.S.C. § 709(f)(1)(A) (stating that a military technician who is separated from the National Guard will also be separated from employment as a military technician); Williams, 533 F.3d at 368 (stating that although the military's actions had "a civilian component" in that the discharge made him ineligible for a civilian position, "the decision to discharge him . . . [was] a military personnel management decision which was integral to the military structure and which we will not second guess"); Overton v. New York State Division of Military and Naval Affairs, 373 F.3d 83, 96 (2d Cir. 2004) (dismissing Title VII claims because "[a]ny attempt to dissect and analyze the civilian

relationship between Overton and Fletcher, with its military dimensions, . . . would itself threaten to intrude into their military relationship," an area where courts are "ill-equipped to determine the impact upon discipline that . . . [such an] intrusion upon military authority might have") (citations omitted). The National Guard's actions regarding Wetherill's retirement from active military status after 30 years of active service, as discussed in 10 U.S.C. § 14507, is "integrally related to the military's unique structure" and therefore is nonjusticiable under Feres and its progeny. See Luckett, 290 F.3d at 499; see also Walch, 533 F.3d at 301; Mier, 57 F.3d at 749 (stating that "[g]uard technicians' challenges to discharge by the Guard and termination from technician employment are nonjusticiable because judicial review 'would seriously impede the military in performance of its vital duties'"). Wetherill's retaliation claim is also barred in light of the military component of her military technician status. See Brown, 227 F.3d 295 (5th Cir. 2000). Finally, to the extent that Wetherill seeks equitable remedies, the court's analysis is the same and such claims are similarly barred. Watson, 886 F.2d at 1008.

In her opposition to the motions to dismiss, Wetherill contends that the plain language of 10 U.S.C. § 10216(a), which describes military technicians as "civilian employees," combined with the language of Title VII, "unequivocally announces that dual status technicians are to be afforded the same substantive rights afforded any other federal civilian employee." Docket 15, page 10. Such an argument has been rejected by other courts. See Walch, 533 F.3d at 299 (stating that reference to technician's "civilian

status [was] an introduction to provisions primarily concerned with the annual requests to Congress for authorizing specific numbers of technician positions"); Williams v. Wynne, 533 F.3d 360, 367 (5th Cir. 2008) (stating that Title VII claims may be precluded by Feres "notwithstanding the statement in § 10216(a) that 'a military technician (dual status) is a Federal civilian employee'"); cf Jentoft v. United States, 450 F.3d 1342, 1348-49 (Fed. Cir. 2006) (finding that military technician brought a justiciable claim under the Equal Pay Act as a civilian employee under § 10216); but see Walch, 533 F.3d at 300 (declining to apply Jentoft to Title VII claims because it "would remove the Feres doctrine as a bar to any federal statutory claims brought by National Guard technicians" and such a "doctrinal revolution has not been noticed by other circuit courts"). This court similarly rejects the argument that the language of § 10216 alters the application of Feres to Title VII, because such a holding would ignore the significant case law to the contrary that discusses the limited availability of Title VII to dual-status military technicians such as Wetherill.

Wetherill argues that she should be given the benefits of discovery to make the case that defendants' conduct was not based on her military status, but was based in impermissible discrimination. Even if Wetherill could establish that defendants' conduct was based on discrimination and not on her military qualifications, it is the nature of the decisions made with regard to her mandatory removal date and work assignments, which decisions are of undeniable military character, which render the claim nonjusticiable under Feres. As the Fifth Circuit said,

> a court may not reconsider what a claimant's superiors did in the name of personnel management-demotions, determining performance level, reassignments to different jobs-because such decisions are integral to the military structure. Some of those decisions might on occasion be infected with the kinds of discrimination that Title VII seeks to correct, but in the military context the disruption of judicially examining each claim in each case has been held to undermine other important concerns.

Walch, 533 F.3d at 301.

For these reasons, the court concludes that Wetherill's complaints are nonjusticiable under the Feres doctrine, and that this court therefore lacks subject matter jurisdiction over her Title VII complaints. Pursuant to the Eighth Circuit's disposition in Wood, 968 F.2d at 740, and Hupp, 144 F.3d at 1148, Wetherill's complaint is dismissed without prejudice. Therefore, good cause appearing, it is hereby

ORDERED that the motion to dismiss filed by defendants Doohen, Johnson, and the South Dakota Army National Guard (Docket 9) is GRANTED without prejudice.

IT IS FURTHER ORDERED that the motion to dismiss filed by defendants Geren and the Army National Guard (Docket 11) is GRANTED without

prejudice.

Dated July 31, 2009.

BY THE COURT:
/s/ Karen E. Schreier
KAREN E. SCHREIER
CHIEF JUDGE

APPENDIX C

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-16(a)

All personnel actions affecting employees or applicants for employment . . . in military departments as defined in section 102 of title 5, United States Code . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)

(a) Employer practices. It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-3(a)

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title . . . , or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title . . . .

42 U.S.C. § 2000e-16(b)

(b) . . . . [T]he Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. . . .

. . . .

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions . . . .

42 U.S.C. § 2000e-16(c)

(c) Civil action by employee or applicant for

employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant. Within 90 days of receipt of notice of final action taken by a department, agency, or unit . . . [a federal] employee . . . , if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action . . . , in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant

42 U.S.C. § 2000e-16(d)

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions. The provisions of section 706(f) through (k) [42 USCS §§ 2000e-5(f)-(k)], as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

42 U.S.C. § 2000e-5(f)

(f) . . . . [If neither the Commission nor the Attorney General bring suit against a governmental agency or political subdivision named as a respondent in a EEO charge, then] "a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved . . . ."

29 C.F.R. 1614.407

A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief pursuant to a class complaint is authorized under title VII, the

ADEA and the Rehabilitation Act to file a civil action in an appropriate United States District Court:

(a) Within 90 days of receipt of the final action on an individual or class complaint if no appeal has been filed;

. . . .

32 U.S.C. § 709(b)

(b) Except as authorized in subsection (c), a person employed under subsection (a) [i.e., a National Guard technician] must meet each of the following requirements:

(1) Be a military technician (dual status) as defined in section 10216(a) of title 10.

(2) Be a member of the National Guard.

(3) Hold the military grade specified by the Secretary concerned for that position.

(4) While performing duties as a military technician (dual status), wear the uniform appropriate for the member's grade and component of the armed forces.

10 U.S.C. §10216(a)

(a) In general.

(1) For purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee who--

(A) is employed under section 3101 of title 5 or section 709(b) of title 32;

(B) is required as a condition of that employment to maintain membership in the Selected Reserve; and

(C) is assigned to a civilian position as a technician

in the organizing, administering, instructing, or training of the Selected Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces.

(2) Military technicians (dual status) shall be authorized and accounted for as a separate category of civilian employees.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

Nancy J. Wetherill,
Plaintiff,

v.

Pete R. Geren, Secretary of the Army; The Army National Guard; Steven R. Doohen, Brigadier General, in his official capacity as Adjutant General of the South Dakota National Guard; Theodore Johnson, Brigadier General, in his official capacity; and The South Dakota Army National Guard,
Defendants.

COMPLAINT

For her Complaint, Plaintiff Nancy J. Wetherill ("Plaintiff") alleges:

JURISDICTION AND VENUE

1. Jurisdiction is conferred on this Court pursuant to 42 U.S.C. § 2000e-5 and § 2000e-16.

2. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

3. Plaintiff filed discrimination charges with the National Guard Bureau ("NGB") on or about May 16, 2008, and received a Dismissal and Notice of Appeal Rights from the NGB on July 1, 2008, which is attached hereto as Exhibit A and incorporated herein by this reference.

PARTIES

4. Plaintiff, a Japanese-American female, commenced her military career with the Army National Guard in 1974, and she was commissioned on July 4, 1977. She was appointed Colonel on July 1, 1999.

5. At all times relevant to this action, Plaintiff was a dual-status military technician within the definition of 10 U.S.C. §10216.

6. Defendant Pete R. Geren is the Secretary of the Army, a military department contemplated by 42 U.S.C. §2000e-16.

7. Defendant Army National Guard is a component of the Army pursuant to 10 U.S.C. §10106.

8. Defendant Steven R. Doohen, Brigadier General, is Adjutant General of the South Dakota National Guard, including the South Dakota Army National Guard.

9. Defendant Theodore Johnson, Brigadier General, was, at all times relevant to this action,

Plaintiff's direct supervisor.

UNLAWFUL DISCRIMINATION IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT, AS AMENDED

10. Plaintiff began her career with the South Dakota National Guard in 1974. From 1982 until August of 2008, she was a resident of South Dakota and served in Rapid City, South Dakota, as a full-time military technician. From April 1, 2007, through July 31, 2008, Plaintiff was the Director of Operations, Military Technician, for the South Dakota Army Guard.

11. Pursuant to 10 U.S.C. § 14507, Plaintiff's Mandatory Removal Date ("MRD") was July 31, 2007. She would have been eligible for full annuity payments under the Civil Service Retirement System ("CSRS") on December 31, 2010.

12. On or about May 10, 2007, Major General Michael A. Gorman, then-Adjutant General of the South Dakota Army National Guard, requested the National Guard Bureau ("NGB") retain Plaintiff beyond her MRD to December 30, 2010, in order that she may qualify for a full annuity under the CSRS. On July 18, 2007, NGB approved this request.

13. On or about September 15, 2007, Major General Gorman retired and South Dakota Governor M. Michael Rounds selected Brigadier General Steven R. Doohen to serve as Adjutant General.

14. On or about January 23, 2008, Adjutant

General Doohen requested the NGB to revoke the MRD extension previously granted to Plaintiff and requested that Plaintiff's new retirement date be set at April 30, 2008.

15. On or about February 2, 2008, Brigadier General Theodore Johnson and Colonel Dennis Flanery notified Plaintiff that she would be terminated from her military technician position on April 30, 2008, for "force management" reasons.

16. Adjutant General Doohen subsequently stayed Plaintiff's termination date from April 30, 2008, to July 31, 2008.

17. In a memorandum dated February 5, 2008, the NGB approved Adjutant General Doohen's "request to revoke the retention beyond MRD to 30 December 2010 on COL Nancy J. Wetherill," holding that the "effective date of separation is 31 July 2008."

18. In February and March of 2008, Plaintiff protested this unorthodox turn of events, requesting that her MRD waiver be reinstated, and complaining that Doohen's actions were motivated by improper gender and/or racial discrimination. These requests were denied.

19. On or about May 8, 2008, Plaintiff was reassigned to another building and was given work that is intended to be performed by persons holding a rank lower than Colonel. Plaintiff was forced to work in an isolated building with no other occupants and was performing work that no Colonel would ever be required to perform.

20. No other technician in the South Dakota Army National Guard has ever been denied the opportunity to receive an unreduced annuity as a result of having an MRD waiver being denied, modified, or revoked.

21. Plaintiff is the only Asian-American female officer serving in the South Dakota Army National Guard.

22. Plaintiff is the only female in the South Dakota Army National Guard to have served at the 06 level in a non-special branch.

23. The reasons given for the revocation of Plaintiff's MRD waiver were pretextual in nature.

24. The decision to revoke Plaintiff's MRD waiver was based on discrimination against her because of her gender.

25. The decision to revoke Plaintiff's MRD waiver was based on discrimination against her because of her race and/or national origin.

26. The acts of moving Plaintiff to an isolated work station and forcing her to perform tasks for which she was severely over-qualified were acts taken in retaliation for Plaintiff's protesting the revocation of her MRD waiver and in retaliation for Plaintiff's complaining of unlawful discrimination, in violation of 42 U.S.C. § 2000e-3(a).

27. As a result of Defendant's discriminatory actions, Plaintiff is prevented from receiving an

unreduced annuity.

28. As a result of Defendant's discriminatory actions, Plaintiff is precluded from receiving future promotions and substantial pay increases.

29. As a result of Defendant's retaliatory actions, Plaintiff suffered humiliation, embarrassment, and shame.

WHEREFORE, Plaintiff prays for the following relief:

A. Restoration and reinstatement of her original NGB Waiver of MRD to December 30, 2010;

B. Restoration and reinstatement to a position equal in grade and stature to the position she held before the forced retirement on July 31, 2008;

C. Compensation for lost pay, back pay, and other damages as provided by law;

D. Attorney's fees and costs;

E. An injunction prohibiting Defendant from further engaging of acts of unlawful discrimination against Plaintiff; and

F. Any other relief the Court deems equitable and just.

Dated the 26th day of September, 2008.

BANGS, McCULLEN, BUTLER,

FOYE & SIMMONS, L.L.P.
By: _____
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SARAH E. BARON HOUY
Attorneys for Plaintiff
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DEPARTMENT OF THE ARMY AND THE AIR FORCE
NATIONAL GUARD BUREAU
1411 JEFFERSON DAVIS HIGHWAY
ARLINGTON VA 22202-3231

NGB-EO-CR (690-00) 24 June 2008

MEMORANDUM FOR State Equal Employment Manager, South Dakota Army National Guard, 2823 West Main Street, Rapid City, South Dakota 57702-8186

SUBJECT: Notice of Dismissal of Discrimination Complaint of Ms. Nancy J. Wetherill and Pete Garen, Secretary of the Army, NGB Case No. T-0895-SD-A-01-08-NG

Ref: (a) Formal Discrimination Complaint Form dated 16 May 2008 and Receipt Acknowledged on 27 May 2008

(b) National Guard Regulation (NGR), Army Regulation (AR), 690-600/NGR, Air Force (AF) 40-1614.

(c) 29 Code of Federal Regulations (CFR) § Part 1614.

1. Pursuant to the provision of NGR (AR) 690-600/NGR (AF) 40-1614, paragraph 4-10, the National Guard Bureau, Office of Equal Opportunity and Civil Rights (NGB-EO-CR) has reviewed the Notice of Dismissal of subject complaint and has determined

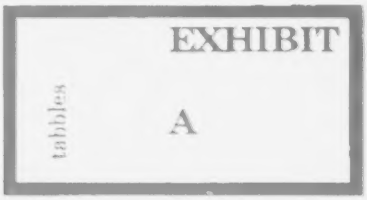
the dismissal was proper. However, the issues have been rewritten and separated from the list of evidence and/or background information included and attached to the formal complaint form.

2. The following issues have been dismissed with the cited reason for dismissal.

a. Complainant claims she is being discriminated against based on her gender (female) and national origin (Asian-American) when on 22 February 2008, she was informed that her Mandatory Retirement Date (MRD) had been readjusted from 31 March 2008 to 31 July 2008. This issue is dismissed in accordance with NGR (AR) 690-600/NGR (AF) 40-1614, paragraph 4-11 (a) (1) and 29 CFR 1614.103 (d) (1) and 107 (a) (1). These statutes state a claim of discrimination may be dismissed that fails to state a claim under §4.1614.103 or §1614.106 (a), and is not within the purview of the State National Guard or the NGB to remedy. This refers to a situation over which neither the State National Guard or the NGB has jurisdiction. Among claims falling in this category are actions that the National Guard is required to take in compliance with the Technician Personnel Act of 1968 (32 U.S.C. 709).

b. Complainant claims she is being discriminated against based on her gender (female) and national origin (Asian-American) when on 2 February 2008, she was informed that she will be terminated from her military technician position, effective 31 July 2008, for "force management" reasons. This issue is dismissed in accordance with NGR (AR) 690-600/NGR (AF) 40-1614 paragraph 4-11 (a) (1) and 29 CFR 1614.103 (d)

(1) and 107 (a) (1). These statutes state a claim of discrimination may be dismissed that fails to state a claim under §4 1614.103 or §1614.106 (a). Additionally, Title 32 U.S.C. 709 (b) (2) states persons employed as technicians must be a member of the National Guard. The statute further states a person



NGB-EO-CR (690-600)
SUBJECT: Notice of Dismissal of Discrimination Complaint of Ms. Nancy J. Wetherill and Pete Geren, Secretary of the Army, NGB Case No. T-0895-SD-A-01-08-NG

who is employed as a military technician (dual status) who is separated from the National Guard or ceases to hold the military grade specified by the Secretary concerned for that position shall be promptly separated from military technician (dual status) employment by the adjutant general of the jurisdiction concerned.

3. If the complainant is dissatisfied with this decision, he/she has the following appeal rights.

APPEAL RIGHTS FOR NON-MIXED COMPLAINTS

1. An appeal may be filed with the Equal Employment Opportunity Commission within 30 calendar days of the date of receipt of this decision. The 30-day period for filing an appeal begins on the date of receipt of this decision. An appeal shall be deemed timely if it is delivered in person, transmitted by facsimile or postmarked before the expiration of the filing period or, in the absence of a legible postmark, the appeal is received by the Commission by mail within 5 days after the expiration of the filing period. The complainant will serve a copy of the Notice of Appeal/Petition, EEOC Form 573, to the agency [Chief of Complaints Management Division, National Guard Bureau, 1411 Jefferson Davis Highway, Suite 2400, Arlington, Virginia 22202] [and

furnish a copy to the Adjutant General California National Guard, 9800 S. Goethe Road, P.O. Box 269101, Sacramento, CA 95826-9101] at the same time it is filed with the Commission. In or attached to the appeal to the Commission, the complainant must certify the date and method by which service was made to the agency [Chief of Complaints Management Division for the National Guard Bureau].

2. The complainant may file a brief or statement in support of his/her appeal with the Office of Federal Operations. The brief or statement must be filed within 30 calendar days from the date the appeal is filed. The complainant will serve a copy of the brief or statement in support of his/her appeal to the agency [Chief of Complaints Management Division for the National Guard Bureau and to the Staff Judge Advocate at the addresses shown above] at the same time the brief or statement is filed with the Commission. The regulation providing for appeal rights is contained in Title 29 of the Code of Federal Regulations, a section of which is reproduced below:

Section 1614.401 Appeals to the Commission.

(a) A complainant may appeal an agency's final action or dismissal of a complaint.

(b) An agency may appeal as provided in Section 1614.110 (a).

NGB-EO-CR (690-600)
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(c) A class agent or an agency may appeal an administrative judge's decision accepting or dismissing all or part of a class complaint; a class agent may appeal a final decision on a class complaint; a class member may appeal a final decision on a claim for individual relief under a class complaint; and a class member, a class agent or an agency may appeal a final decision on a petition pursuant to Section 1614.204 (g) (4).

(d) A grievant may appeal the final decision of the agency, the arbitrator or the Federal Labor Relations Authority (FLRA) on the grievance when an issue of employment discrimination was raised in a negotiated grievance procedure that permits such issues to be raised. A grievant may not appeal under this part, however, when the matter initially raised in the negotiated grievance procedure is still ongoing in that process, is in arbitration, is before the FLRA, is appealable to the MSPB [Merit Systems Protection Board] or if 5 U.S.C. 7121 (d) is inapplicable to the involved agency.

(e) A complainant, agent or individual class claimant may appeal to the Commission an agency's alleged noncompliance with a settlement agreement or final decision in accordance with Section 1614.504.

Section 1614.402 Time for Appeals to the

Commission.

(a) Appeals described in Section 1614.401(a) and (c) must be filed within 30 days of receipt of the dismissal, final action or decision. Appeals described in Section 1614.401(b) must be filed within 40 days of receipt of the hearing file and decision. Where a complainant has notified the Director, National Guard Bureau, Equal Opportunity and Civil Rights [Chief of Complaints Management Division, National Guard Bureau] of alleged noncompliance with a settlement agreement in accordance with Section 1614.504, the complainant may file an appeal 35 days after service of the allegations of noncompliance, but no later than 30 days after receipt of the agency's determination.

(b) If the complainant is represented by an attorney of record, then the 30-day time period provided in paragraph (a) of this section within which to appeal shall be calculated from the receipt of the required document by the attorney. In all other instances, the time within which to appeal shall be calculated from the receipt of the required document by the complainant.

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Section 1614.403 How to appeal.

(a) The complainant, agency, agent, grievant or individual class claimant (hereinafter appellant) must file an appeal with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, at P.O. Box 19848, Washington, DC 20036, or by personal delivery or facsimile. The complainant should use EEOC Form 573, Notice of Appeal/Petition [copy enclosed], and should indicate what is being appealed.

(b) The appellant shall furnish a copy of the appeal to the opposing party [Chief of Complaints Management Division, National Guard Bureau and to the Staff Judge Advocate - addresses shown above] at the same time it is filed with the Commission. In or attached to the appeal to the Commission, the appellant must certify the date and method by which service was made on the opposing party [Chief of Complaints Management Division, National Guard Bureau].

(c) If an appellant does not file an appeal within the time limits of this subpart, the appeal shall be dismissed by the Commission as untimely.

(d) Any statement or brief on behalf of a complainant in support of the appeal must be

submitted to the Office of Federal Operations within 30 days of filing the notice of appeal. Any statement or brief on behalf of the agency in support of its appeal must be submitted to the Office of Federal Operations within 20 days of filing the notice of appeal. The Office of Federal Operations will accept statements or briefs in support of an appeal by facsimile transmittal, provided they are no more than 10 pages long.

(e) The agency must submit the complaint file to the Office of Federal Operations within 30 days of initial notification that the complainant has filed an appeal or within 30 days of submission of an appeal by the agency.

(f) Any statement or brief in opposition to an appeal must be submitted to the Commission and served on the opposing party within 30 days of receipt of the statement or brief supporting the appeal, or, if no statement or brief supporting the appeal is filed, within 60 days of receipt of the appeal. The Office of Federal Operations will accept statements or briefs in opposition to an appeal by facsimile provided they are no more than 10 pages long.

NGB-EO-CR (690-600)
SUBJECT: Notice of Dismissal of Discrimination Complaint of Ms. Nancy J. Wetherill and Pete Geren, Secretary of the Army, NGB Case No. T-0895-SD-A-01-08-NG

Section 1614.407 Civil Action: Title VII, Age Discrimination in Employment Act and Rehabilitation Act

A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief pursuant to a class complaint is authorized under Title VII, the ADEA [Age Discrimination in Employment Act] and the Rehabilitation Act to file a civil action in an appropriate United States District Court:

(a) Within 90 calendar days of receipt of the final action on an individual or class complaint if no appeal has been filed;

(b) After 180 days from the date of filing an individual or class complaint if an appeal has not been filed and final action has not been taken;

(c) Within 90 days of receipt of the Commission's final decision on an appeal; or

(d) After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

Section 1614.408 Civil Action: Equal Pay Act

A complainant is authorized under section 16(b) of the Fair Labor Standards Act (29 U.S.C. 216[b]) to file a civil action in a court of competent jurisdiction within two years or, if the violation is willful, three years of the date of the alleged violation of the Equal Pay Act regardless of whether he or she pursued any administrative complaint processing. Recovery of back wages is limited to two years prior to the dale of filing suit, or to three years if the violation is deemed willful; liquidated damages in an equal amount may also be awarded. The filing of a complaint or appeal under this part shall not toll the time for filing a civil action.

Section 1614.409 Effect of Filing a Civil Action.

Filing a civil action under § 1614.408 or §1614.409 shall terminate Commission processing of the appeal. If private suit is filed subsequent to the filing of an appeal, the parties are requested to notify the Commission in writing.

NGB-EO-CR (690-600)
SUBJECT: Notice of Dismissal of Discrimination Complaint of Ms. Nancy J. Wetherill and Pete Geren, Secretary of the Army, NGB Case No. T-0895-SD-A-01-08-NG

If a civil action is filed and complainant does not have or is unable to obtain the services of a lawyer, the complainant may request the court to appoint a lawyer. In such circumstances as the court may deem just, the court may appoint a lawyer to represent the complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Any such request must be made within the above referenced 90-day time limit for filing suit and in such form and manner as the court may require.

You are further notified that if you file a civil action, you must name the appropriate Department or Agency head as the defendant and provide his or her official title. DO NOT NAME JUST THE AGENCY OR DEPARTMENT. Failure to name the head of the Department or Agency or to state her or her official title may result in the dismissal of the case. The appropriate agency is the Army National Guard. The head of the Army National Guard is the Honorable Pete R. Geren, Secretary of the Army.

DOCKET NUMBER

The docket number identified in the subject line of this memorandum should be used on all correspondence.

4. If you have any questions regarding this matter,

you may contact Ms. Gina Nesbitt at (703) 607-0769 or DSN 327-0769.
NGB-EO-CR (690-600)
SUBJECT: Notice of Dismissal of Discrimination Complaint of Ms. Nancy J. Wetherill and Pete Geren, Secretary of the Army, NGB Case No. T-0895-SD-A-01-08-NG

Encl
EEOC Form 573

J. PAGE
Chief, Complaints
Management
National Guard Bureau

CF:
Ms. Nancy J. Wetherill, Complainant (w/encl)
The Adjutant General, SD (w/o encl)
The Staff Judge Advocate, SD (w/o encl)

NOTICE OF APPEAL/PETITION TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OFFICE OF FEDERAL OPERATIONS
P.O. Box 19848
Washington, DC 20036

Complainant Information: (Please Print or Type)

Complainant's name (Last, First M.I.):	
Home/mailing address:	
City, State, ZIP code:	
Daytime telephone # (with area code):	
E-mail address (if any):	

Attorney/Representative Information (if any):

Attorney name:	
Non-Attorney Representative name:	
Address:	
City, State, ZIP Code:	
Telephone number (if applicable):	
E-mail address (if any):	

General Information:

Name of the agency being charged with discrimination:	
Identify the Agency's	

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No. 10-638

In the Supreme Court of the United States

NANCY J. WETHERILL, PETITIONER

v.

JOHN MCHUGH, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a military technician (dual status) may maintain a suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a), to recover for alleged discrimination arising out of activity incident to her military service.

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In the Supreme Court of the United States

No. 10-638

NANCY J. WETHERILL, PETITIONER

v.

JOHN MCHUGH, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 616 F.3d 789. The order of the district court (Pet. App. 26a-39a) is reported at 644 F. Supp. 2d 1135.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2010. The petition for a writ of certiorari was filed on November 9, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has exercised its extensive constitutional powers over matters of national defense by estab-

lishing the armed forces of the United States. These forces consist of the Army, Navy, Air Force, Marine Corps, and Coast Guard. See 32 U.S.C. 101(2). The armed forces each have reserve components in order to provide trained military units as a supplement "[i]n time of war or national emergency, and at such other times as the national security may require." 10 U.S.C. 10102. The reserve components of the Army are the Army Reserve and the Army National Guard of the United States. 10 U.S.C. 10101. This case concerns an attempt by a military technician (dual status) in the Army National Guard to sue the Secretary of the Army and others under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a), to recover for alleged discrimination arising out of activity incident to her military service.

a. Military technician programs originated during the World War I era, when state National Guard organizations created hybrid positions, held by state employees who were also Guard members, to perform maintenance and clerical duties. See Michael J. Davidson, *Neither Man Nor Beast: The National Guard Technician, Modern Day Military Minotaur*, Army Lawyer 49, 51 (Dec. 1995). The National Guard technician program continued after 1933, when Congress created two overlapping but distinct organizations—the National Guard of the various States and the National Guard of the United States—and required all persons enlisted in a state National Guard to be simultaneously enlisted in the National Guard of the United States. See *Perpich* v. *Department of Def.*, 496 U.S. 334, 345 (1990). Thus, members of a state National Guard, including National Guard technicians, are also reserve members of the

Army. See *ibid.*; 10 U.S.C. 10143 (discussing Selected Reserve, which includes National Guard members).

In 1968, Congress conferred federal civilian employee status on National Guard technicians. See National Guard Technicians Act of 1968, Pub. L. No. 90-486, 82 Stat. 755. In so doing, Congress sought to aid recruitment and retention for those positions by providing those "essentially state military personnel" with federal retirement and fringe benefits while preserving "the essential military requirements" of the positions. *American Fed'n of Gov't Employees* v. *FLRA*, 730 F.2d 1534, 1543 (D.C. Cir. 1984) (*AFGE*).

The 1968 Act recognizes two types of National Guard technicians—dual-status, 32 U.S.C. 709(b), and non-dual-status, 32 U.S.C. 709(c). A dual-status technician must be a member of the National Guard, hold the military grade specified by the Secretary for that position, and wear a military uniform while performing his or her duties. 32 U.S.C. 709(b). Dual-status technicians work as civilians in their military unit, serve as members of the military with the same or a related unit, and are available at all times to be called into active federal service. See *AFGE*, 730 F.2d at 1545; Nat'l Guard Bureau, Technician Pers. Reg. 303, para. 2-1.b (Aug. 24, 2005). They are assigned substantially equivalent duties in their civilian and military positions and usually report to the same military supervisor in both capacities. See *id.* paras. 1.1, 2-1.b; DoD Instruction No. 1205.18, para. 6.101 (May 4, 2007).[1]

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[1] In 1957, the Air Force created its own reserve technician program. See *American Fed'n of Gov't Employees* v. *Hoffman*, 543 F.2d 930, 932-936 (D.C. Cir. 1976), cert. denied, 430 U.S. 965 (1977). The question whether dual status military technicians in the Air Force may bring Title VII suits that arise out of their military service is presented by the

b. In 1996, Congress enacted legislation requiring all National Guard and other military technicians hired thereafter to be dual-status, *i.e.*, to maintain membership in the armed forces reserves as a condition of their federal employment. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 513, 110 Stat. 305-306. That legislation alternately referred to the technicians as "military technicians" and as "dual-status military technicians." *Ibid.* Appropriations legislation used still different terminology, referring to the technicians as "military (civilian) technicians." Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, § 8087, 109 Stat. 668.

In a separate law enacted later in 1996, Congress provided a military-wide definition for the "military technician" position:

> Military technicians are Federal civilian employees hired under title 5 and title 32 who are required to maintain dual-status as drilling reserve component members as a condition of their Federal civilian employment. Such employees shall be authorized and accounted for as a separate category of dual-status civilian employees, exempt as specified in subsection (b)(3) from any general or regulatory requirement for adjustments in Department of Defense civilian personnel.

National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1214, 110 Stat. 2695 (10 U.S.C. 10216).

In 1997, Congress adopted a new title for the position-- "military technician (dual status)"—and sought to

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petition for a writ of certiorari filed in *Zuress* v. *Donley*, No. 10-374 (filed Sept. 16, 2010).

amend every provision of the United States Code that mentions the position to use that nomenclature. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 522(a) and (g)-(i), 111 Stat. 1734, 1735-1736. The House Report accompanying the amendments explained that clarification was needed because previous enactments contained "provisions defining the term 'military technician' which were not completely consistent with one another." H.R. Rep. No. 132, 105th Cong., 1st Sess. 358 (1997) (*House Report*). The amended definition, the Report explained, "would remove the inconsistencies" by providing a uniform definition for the term "military technician (dual status)." *Ibid.*

As amended in 1997, the definition of "military technician (dual status)" provides as follows:

> For purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee who—
>
> (A) is employed under section 3101 of title 5 or section 709(b) of title 32;
>
> (B) is required as a condition of that employment to maintain membership in the Selected Reserve; and
>
> (C) is assigned to a civilian position as a technician in the administration and training of the Selected Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces.

10 U.S.C. 10216(a) (2000).

c. Based on the principle that waivers of sovereign immunity are strictly construed and the doctrine of intra-military immunity derived from *Feres* v. *United*

States, 340 U.S. 135 (1950), the courts of appeals have uniformly concluded that Title VII does not apply to uniformed members of the armed forces. See *Hodge* v. *Dalton*, 107 F.3d 705, 708 (9th Cir.) (citing cases), cert. denied, 522 U.S. 815 (1997). The courts of appeals have also uniformly concluded that dual-status military technicians may not bring Title VII suits based on alleged discrimination that is incident to their military service. See, *e.g.*, *Overton* v. *New York State Div. of Military & Naval Affairs*, 373 F.3d 83, 96 (2d Cir. 2004); *Brown* v. *United States*, 227 F.3d 295, 299 (5th Cir. 2000), cert. denied, 531 U.S. 1152 (2001); *Fisher* v. *Peters*, 249 F.3d 433, 443-444 (6th Cir. 2001); *Hupp* v. *United States Dep't of the Army*, 144 F.3d 1144, 1148 (8th Cir. 1998); *Mier* v. *Owens*, 57 F.3d 747, 748 (9th Cir. 1995), cert. denied, 517 U.S. 1103 (1996); see also *Willis* v. *Roche*, 256 Fed. Appx. 534, 537 (3d Cir. 2007).

Like other members of the military, dual-status technicians have numerous alternative remedies for service-related discrimination claims. For example, a dual-status National Guard technician who believes that he or she has suffered service-related discrimination may seek assistance from a military Equal Opportunity advisor or any member of his or her unit chain of command and may file a formal or informal complaint. See Nat'l Guard Reg. 600-22, paras. 2-1, 2-2 (Mar. 30, 2001). A formal complaint triggers a review, and, if appropriate, an investigation of the technician's allegations by the applicable level of command. See *id.* para. 2-2.c. If the complaint is not resolved to the technician's satisfaction, the complaint is automatically referred to successive higher levels of command. See *id.* para. 2-2.e and f. Dual-status National Guard technicians also may pursue relief from the Army Board for Correction of Military

Records, see 10 U.S.C. 1552 (2006 & Supp. III 2009), and may bring federal court actions seeking injunctive relief for alleged violations of the Constitution. See, *e.g.*, *Brown* v. *Glines*, 444 U.S. 348 (1980); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

2. Petitioner, who is a Japanese-American woman, began working for the South Dakota Army National Guard in 1974. She was commissioned as an officer on July 4, 1977, and was promoted to Colonel on July 1, 1999. During this time, she was employed as a dual-status National Guard technician. Pet. App. 3a.

National Guard Colonels who have not been recommended for promotion to a higher rank are required to retire from the military after 30 years of commissioned service. 10 U.S.C. 14507(b). Thus, unless petitioner was promoted beyond the rank of Colonel, her mandatory retirement date from the military was July 31, 2007. Pet. App. 3a. Under Civil Service Retirement System regulations, however, petitioner could not qualify for a full civil service retirement annuity unless she continued working as a civilian federal employee for an additional three years and five months, until December 31, 2010. *Ibid.* And, under 10 U.S.C. 10216(a) and 32 U.S.C. 709(b), petitioner could not maintain her civilian job once she retired from the military. Pet. App. 3a.

Petitioner therefore asked the then-Adjutant-General of the South Dakota Army National Guard (Major General Michael A. Gorman) to waive her mandatory date of retirement from the Guard so that she could continue working until her civil service annuity fully matured. General Gorman granted her request on May 10, 2007, and the National Guard approved his decision on July 18 of the same year. Pet. App. 4a.

In September 2007, General Gorman retired, and Brigadier General Steven R. Doohen was appointed Adjutant-General of the South Dakota Army National Guard. In January 2008, General Doohen asked the National Guard to revoke the waiver that petitioner had been given. General Doohen informed petitioner about his request in February 2008, and told her, petitioner alleges, that he had made it for "force management" reasons. Pet. App. 4a (quoting *id.* at 48a (Compl. para. 15)). The National Guard approved General Doohen's request, and petitioner's mandatory date retirement date was reset to July 31, 2008. *Ibid.* Between May and July of 2008, petitioner was reassigned to a building where she worked in a room by herself and was given work that she alleges "no Colonel would ever be required to perform." *Ibid.* (quoting *id.* at 48a (Compl. para. 19)). Petitioner retired from the Guard on July 31, 2008, and thus had to relinquish her civilian job as well. *Id.* at 5a.[2]

Petitioner complained about the above actions both formally and informally to the National Guard's Office of Equal Opportunity and Civil Rights, alleging sex and/or national origin discrimination. After the National Guard Bureau denied her request for administrative relief, she filed this action in federal district court

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[2] Upon petitioner's retirement, she qualified for an immediate civil service annuity under 5 U.S.C. 8336 (2006 & Supp. III 2009). Because petitioner was less than 55 years old on the date of her retirement, however, her annuity was subject to a slight reduction pursuant to the formula prescribed in 5 U.S.C. 8339 (2006 & Supp. III 2009). We are informed by the National Guard Bureau that, on September 7, 2010, petitioner was hired as a re-employed annuitant under 5 U.S.C. 9902 (Supp. III 2009), and she remains employed in that capacity. When petitioner turns 60 years old, she will also begin receiving a military pension. 10 U.S.C. 12731 (2006 & Supp. III 2009).

against the Secretary of the Army, the Army National Guard, General Doohen and another general, and the South Dakota Army National Guard. The complaint alleged discrimination and retaliation based on sex and/or national origin in violation of Title VII, 42 U.S.C. 2000e-2(a)(1). See Pet. App. 4a-5a.

3. The district court dismissed petitioner's complaint, holding that principles of intra-military immunity barred consideration of her Title VII claims. Pet. App. 26a-39a. The district court noted that some courts of appeals have held that "there may be liability under Title VII for some decisions that involve the purely civilian aspects of" a dual-status technician's position. *Id.* at 34a (citing decisions from the Second, Fifth, and Ninth Circuits). Other circuits, the district court stated, "have found that military technicians are 'irreducibly military in nature,' and, therefore, civil suits are always nonjusticiable" under intra-military immunity principles. *Ibid.* (quoting *Fisher*, 249 F.3d at 443).

The district court concluded that, "[u]nder any of the[] analyses used by various courts of appeal[s], [petitioner's] Title VII claims are barred." Pet. App. 35a. With respect to the revocation of the waiver of her military retirement date, the court held that, "[w]hile her removal from active-status compromised her civilian employment at that time, the action taken by defendants was a military personnel management decision." *Ibid.* The court held that petitioner's retaliation claim also is barred "in light of the military component of her military technician status." *Id.* at 36a.

The district court rejected petitioner's argument that the definition of "military technician (dual status)" added by the 1997 amendments to 10 U.S.C. 10216(a), which describes dual-status technicians as "civilian employ-

ees," authorized the court to address her Title VII claims. Pet. App. 36a-37a. The court explained that, although the Federal Circuit in *Jentoft* v. *United States*, 450 F.3d 1342, 1348-1349 (2006), had relied on Section 10216 in holding that a dual-status technician could bring a service-related claim under the Equal Pay Act of 1963, two Fifth Circuit decisions had "declin[ed] to apply *Jentoft* to Title VII claims." Pet. App. 37a (citing *Williams* v. *Wynne*, 533 F.3d 360, 367 (2008), and *Walch* v. *Adjutant Gen.'s Dep't*, 533 F.3d 289, 300 (2008)).

4. The court of appeals affirmed. Pet. App. 1a-21a. The court began by holding that the 1997 amendments to 10 U.S.C. 10216 "do not remove dual-status National Guard technicians from the strictures of the *Feres* [intra-military immunity] doctrine." Pet. App. 14a. In prior decisions, the court observed, the civilian aspect of the dual-status technician positions had given the court "no pause in applying the *Feres* doctrine to the military aspects of that position." *Ibid.* As a result, the panel held that "the recognition in the 1997 amendments that dual-status technicians are federal civilian employees—albeit civilian employees which had as a condition of their employment that they remain members of the armed services—was * * * 'nothing new.'" *Ibid.* The panel concluded that the reference in the 1997 amendments to "any other provision of law" was intended merely "to harmonize the nomenclature to be used for dual-status technicians throughout the U.S. Code." *Ibid.* (citing *Zuress* v. *Donley*, 606 F.3d 1249, 1255 (9th Cir. 2010), petition for cert. pending, No. 10-374 (filed Sept. 16, 2010)). "Indeed," the panel observed, "it would have been odd for Congress fundamentally to alter the legal condition of dual-status technicians in 10 U.S.C. § 10216, a statute that overwhelmingly just addresses

the details of obtaining funding for National Guard positions," Pet. App. 15a (citing 10 U.S.C. 10216(b)), "rather than in 32 U.S.C. § 709, which defines the position of dual-status technician [in the National Guard] and lays out who may and may not occupy such a position," Pet. App. 15a.

Turning to the question whether the district court had correctly dismissed petitioner's Title VII claims under principles of intra-military immunity, the court of appeals observed that different circuits have used somewhat different formulations in describing when dual-status technicians may maintain such claims. Pet. App. 16a-19a. The court of appeals noted that the district court had concluded that petitioner's claims were barred "[u]nder any of these analyses used by various courts of appeal[s]." *Id.* at 16a (first brackets in original; citation omitted). The court of appeals stated that, in any event, it was not persuaded that the various formulations used by most of the circuits "reflect anything more than the unique facts and claims presented by the parties in those particular cases." *Id.* at 18a. The essential question, the court held, is always "whether the injury arose out of activity incident to military service." *Id.* at 19a.[3]

Applying that test, the panel held that the district court had correctly concluded that petitioner's Title VII claims are incident to her military service. Pet. App.

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[3] The court of appeals noted that the Sixth Circuit has apparently held that dual-status technician's Title VII claims always arise out of activity incident to military service because their jobs are "irreducibly military in nature." Pet. App. 19a (quoting *Fisher*, 249 F.3d at 443). The court of appeals "decline[d] to adopt such a categorical rule," explaining that "it is conceivable that a dual-status technician might suffer an injury purely as a civilian that could give rise to a justiciable" Title VII claim. *Ibid.*

19a-21a. "The essential core of [petitioner's] complaint," the court of appeals explained, "is that the Guard discriminatorily revoked" the waiver of her mandatory retirement date, and the "waiver and its revocation related exclusively to her military position—the effect on her civilian position was purely secondary and incidental." *Id.* at 20a. Indeed, the court noted, petitioner "herself informed the district court in her complaint that the Guard claimed a military motive for its actions." *Ibid.* And, in complaining that "she was given work 'that no Colonel would ever be required to perform,'" petitioner herself "identifie[d] as the source of [her] humiliation her military rank of Colonel." *Ibid.* In sum, the court held, petitioner's case "is precisely the *opposite* of a case where a dual-status technician might have a claim against the Guard under Title VII. The action she complained of was purely military, rather than purely civilian, in nature, even though that military action happened to have some civilian consequences." *Id.* at 20a-21a.

ARGUMENT

Petitioner contends (Pet. 8-12) that this Court's review is warranted to resolve two purported circuit conflicts concerning the circumstances under which tort claims by dual-status military technicians are justiciable. Petitioner further contends (Pet. 12-23) that the Court should grant review to clarify that principles of intra-military immunity never bar Title VII claims by dual-status technicians. The courts of appeals (and the Equal Employment Opportunity Commission (EEOC)), however, agree that principles of sovereign and intra-military immunity preclude dual-status technicians from bringing service-related Title VII claims. And no conflict among the courts of appeals on the circumstances in

which dual-status technicians may bring such claims warrants this Court's review. Accordingly, the Court should deny the petition for a writ of certiorari.

1. It is well settled that "[j]urisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity." *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003); accord *Lane* v. *Pena*, 518 U.S. 187, 192 (1996); *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 33 (1992). In addition, in *Feres* v. *United States*, 340 U.S. 135 (1950), this Court held that members of the armed forces may not bring suits under the Federal Tort Claims Act (FTCA) for injuries that "arise out of or are in the course of activity incident to service." *Id.* at 146; see also *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666, 667 n.1, 673-674 (1977) (applying *Feres* to bar a claim by a National Guard officer). The Court has further held that the concerns underlying its decision in *Feres* also require the conclusion that service members may not bring actions under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to recover damages for violations of their civil rights or other constitutional torts arising from activities incident to their military service. *United States* v. *Stanley*, 483 U.S. 669 (1987); *Chappell* v. *Wallace*, 462 U.S. 296 (1983). The Court explained that these decisions were driven primarily "by the 'peculiar and special relationship of the soldier to his superiors, [and] the effects of the maintenance of such suits on discipline.'" *Id.* at 299 (brackets in original; citations omitted).

As noted above, see pp. 5-6, *supra*, based on these principles of sovereign and intra-military immunity, the courts of appeals have uniformly concluded that Title

VII does not apply to uniformed members of the armed forces. See *Hodge* v. *Dalton*, 107 F.3d 705, 708 (9th Cir.) (citing cases), cert. denied, 522 U.S. 815 (1997). The courts of appeals also have uniformly concluded that dual-status military technicians may not bring Title VII suits based on alleged discrimination that is incident to their military service. See p. 6, *supra* (citing cases). In such circumstances, those employees, like other uniformed members of the military, may instead pursue various alternative remedies for service-related discrimination claims. See pp. 6-7, *supra*.

Petitioner nonetheless argues (Pet. 12-17) that the 1997 amendments to 10 U.S.C. 10216(a) authorized dual-status military technicians to bring Title VII actions on the same terms as purely civilian employees. Petitioner relies (Pet. 12) on the amendments' statement that the definition of "military technician (dual status)" applies for purposes of Section 10216 "and any other provision of law," coupled with the definition's statement that a "military technician (dual status) is a Federal civilian employee." 10 U.S.C. 10216(a)(1). The court below correctly rejected petitioner's argument, as has every other court of appeals that has considered the issue. See Pet. App. 13a-15a; *Bowers* v. *Wynne*, 615 F.3d 455, 466-468 (6th Cir. 2010); *Zuress* v. *Donley*, 606 F.3d 1249, 1254-1255 (9th Cir. 2010), pet. for cert. pending, No. 10-374 (filed Sept. 16, 2010); *Walch* v. *Adjutant Gen.'s Dep't*, 533 F.3d 289, 299-301 (5th Cir. 2008); see also *Williams* v. *Wynne*, 533 F.3d 360, 366-368 (5th Cir. 2008).

The 1997 amendments do not mention Title VII, purport to authorize any new cause of action against the United States, or contain any language that expressly waives the United States' sovereign immunity. That fact alone requires the conclusion that the amendments do

not waive the sovereign immunity of the United States for Title VII claims by dual-status military technicians that are related to their military service.

The absence of any clear statement creating a cause of action or waiving immunity is particularly fatal to petitioner's argument because, before the 1997 amendments, it was well settled that dual-status military technicians did not have the same rights to bring Title VII actions as purely civilian employees. As discussed above, the courts of appeals had consistently held that uniformed members of the military have no right to sue under Title VII, and the only court of appeals that had addressed the ability of dual-status technicians to sue under Title VII had held that their claims are nonjusticiable when they are service-related. See *Mier* v. *Owens*, 57 F.3d 747, 749 (9th Cir. 1995) (dual-status technicians may not bring Title VII suits based on "personnel actions integrally related to the military's unique structure"), cert. denied, 517 U.S. 1103 (1996). Moreover, numerous other courts had held that principles of intra-military immunity bar dual-status military technicians from bringing damages actions under other statutes based on alleged violations of their civil rights that are incident to their military service. See, *e.g.*, *Wright* v. *Park*, 5 F.3d 586, 586-591 (1st Cir. 1993); *Wood* v. *United States*, 968 F.2d 738, 740 (8th Cir. 1992); *Watson* v. *Arkansas Nat'l Guard*, 886 F.2d 1004, 1005-1008 & n.1 (8th Cir. 1989); *Jorden* v. *National Guard Bureau*, 799 F.2d 99, 107-108 (3d Cir. 1986), cert. denied, 484 U.S. 815 (1987); *Martelon* v. *Temple*, 747 F.2d 1348, 1350-1351 (10th Cir. 1984), cert. denied, 471 U.S. 1135 (1985). Congress is presumed to be familiar with established case law and to expect that its enactments will be interpreted as consistent with that law unless those en-

actments provide otherwise. *United States* v. *Wells*, 519 U.S. 482, 495 (1997). If Congress intended the 1997 amendments to effect the "radical departure[] from past practice" asserted by petitioner, Congress surely would have "ma[de] a point of saying so." *Jones* v. *United States*, 526 U.S. 227, 234 (1999).

In addition, Section 10216(a) "does not end with the statement that dual status technicians are federal civilian employees. It [goes on to] state[] that National Guard technicians and [Air Force Reserve Technicians] are 'dual status' employees because they are federal civilian employees *and* members of the reserve forces." *Bowers*, 615 F.3d at 467 (citation omitted). As explained above, dual-status technicians play a critical role in our nation's military defense, often report to the same military supervisor in both their military and civilian positions, must wear their military uniform while working in their civilian jobs, and must maintain their military status in order to keep their civilian jobs. Nothing in Section 10216 suggests that those facts should be ignored when dual-status technicians attempt to sue the military for alleged Title VII violations that are incident to their military service.[4]

As the court below recognized, the 1997 amendments added the phrase "any other provision of law" to the

[4] Moreover, as the court of appeals observed, "it would have been odd for Congress fundamentally to alter the legal condition of dual-status technicians in 10 U.S.C. § 10216, a statute that overwhelmingly just addresses the details of obtaining funding for National Guard positions," Pet. App. 15a (citing 10 U.S.C. 10216(b)), "rather than in 32 U.S.C. § 709, which defines the position of dual-status technician [in the National Guard] and lays out who may and may not occupy such a position," Pet. App. 15a (noting that "Congress 'does not, one might say, hide elephants in mouseholes'" (quoting *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

definition in Section 10216(a)(1) "to eliminate inconsistencies in the nomenclature used to refer to dual status technicians, rather than to override settled case law on intra-military immunity." Pet. App. 13a (internal quotation marks and citation omitted). The House Report accompanying the amendments explained that they were needed because previous enactments contained "provisions defining the term 'military technician' which were not completely consistent with one another." *House Report* 358. The amended definition, the Report explained, "would remove the inconsistencies" by providing a uniform definition for the term "military technician (dual status)." *Ibid.* The legislative history thus confirms that Congress did not intend the 1997 amendments to waive the United States' sovereign immunity for service-related Title VII suits by dual-status military technicians. See Pet. App. 13a-14a; *Zuress*, 606 F.3d at 1255; *Bowers*, 615 F.3d at 467.

2. Contrary to petitioner's contention (Pet. 8-9), this Court's review is not warranted to resolve a purported conflict between the decision below and the Federal Circuit's decision in *Jentoft* v. *United States*, 450 F.3d 1342 (Fed. Cir. 2006). *Jentoft* involved the right of a dual-status military technician to sue under the Equal Pay Act, not Title VII. *Id.* at 1348; see *id.* at 1345 n.2 (noting that Jentoft had abandoned her Title VII claims). Moreover, in concluding that Section 10216(a)'s definition of dual-status technicians as "civilian" employees entitles them to bring service-related Equal Pay Act suits, the Federal Circuit relied on "the plain language of the Equal Pay Act," which defines a covered employee to include "any individual employed by the Government of the United States . . . as a *civilian* in the military departments." *Id.* at 1348 (emphasis added) (quoting

29 U.S.C. 203(e)(2)(A)(i)). Title VII contains no such language. See also *Bowers*, 615 F.3d at 467 (distinguishing *Jentoft* because it involved the Equal Pay Act); *Walch*, 533 F.3d at 300-301 (same).

In any event, to the extent that *Jentoft* is in tension with the Title VII decisions of the other courts of appeals, the Federal Circuit may reconsider its decision in *Jentoft*. The Federal Circuit did not consider the legislative history of the 1997 amendments in reaching its decision, nor did it have the benefit of the analysis of the four circuits that have since held that the 1997 amendments do not authorize service-related Title VII actions by dual-status military technicians. See p. 14, *supra* (citing cases). Nothing would prevent the government from asking the Federal Circuit to reexamine *Jentoft* in light of those considerations in an appropriate case. See Fed. R. App. P. 35(b) (authorizing petitions for initial hearing en banc); Fed. Cir. R. 35(a)(1) (authorizing arguments to a panel that circuit precedent should be overruled).

3. Petitioner also errs in contending (Pet. 8-11) that this Court's review is warranted to resolve a disagreement among the courts of appeals over when dual-status technicians may bring Title VII claims. The vast majority of the circuits that have addressed the issue agree with the court below that dual-status technicians may not bring Title VII claims that "ar[i]se out of activity incident to military service," Pet. App. 19a, although the precise wording that the courts use in articulating that standard varies slightly. See *Overton* v. *New York State Div. of Military & Naval Affairs*, 373 F.3d 83, 95 (2d Cir. 2004) (claim barred unless it is "purely civilian" and does not challenge conduct "integrally related to the military's unique structure"); *Brown* v. *United States*,

227 F.3d 295, 299 (5th Cir. 2000) (claim barred unless it arises "purely" from technician's "civilian position" and does not "originate from [technician's] military status"), cert. denied, 531 U.S. 1152 (2001); *Mier*, 57 F.3d at 748 (claim barred if challenged conduct is "integrally related to the military's unique structure"). As the court of appeals in this case noted (Pet. App. 19a), the Sixth Circuit appears to have adopted a categorical bar on Title VII claims by dual-status technicians, reasoning that their claims always arise out of their military status because their positions are "irreducibly military in nature." *Fisher* v. *Peters*, 249 F.3d 433, 439 (2001). Drawing on the decisions of other courts of appeals, however, the court in *Fisher* also considered whether "the challenged actions are integrally military or within the military sphere." *Id.* at 443. In any event, any apparent difference in approach has not led to a difference in outcomes, because no court of appeals has encountered a Title VII claim by a dual-status technician that did not arise out of activity incident to military service. Absent evidence that divergent approaches among the courts of appeals are resulting in divergent outcomes, this Court review of the issue is not warranted.[5]

Even if the Court's review might be warranted in an appropriate case, review would not be warranted here because both courts below concluded that petitioner's Title VII claims arise out of activity incident to her military service and therefore would not be cognizable in any circuit. See Pet. App. 16a, 19a-21a, 35a-36a. As explained by the courts below, decisions relating to wheth-

[5] Petitioner identifies only a single district court decision that has allowed a dual-status technician's Title VII claim to proceed. See Pet. 11 (citing *Laurent* v. *Geren*, Civ. No. 2004-0024, 2008 WL 4587290 (D.V.I. Oct. 10, 2008)).

er a service member will be allowed to remain in the military are clearly service-related. See *id.* at 20a, 35a. Petitioner makes no serious argument to the contrary. Because petitioner's claim, as it comes to this Court, would not be cognizable in any circuit, this case does not present an appropriate vehicle to resolve any disagreement among the courts of appeals about whether all Title VII claims by dual-status military technicians are necessarily service-related.

4. Finally, petitioner argues (Pet. 17-23) that the Court should grant review in order to hold that principles of intra-military immunity never bar Title VII claims by dual-status technicians. That position, however, lacks merit and has been uniformly rejected not only by the courts of appeals but also by the EEOC.

Petitioner asserts (Pet. 17-21) that the rationales underlying the doctrine of intra-military immunity do not apply to service-related Title VII claims because "illegal discrimination is not a legitimate tool of military order." Pet. 20. The doctrine of intra-military immunity, however, is based on the recognition that merely allowing judicial consideration of service-related claims for damages by uniformed military personnel against the military could result in the second-guessing of military judgments and other intrusions into the military mission. See *United States* v. *Johnson*, 481 U.S. 681, 691 (1987) (noting that "a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission"); *United States* v. *Stanley*, 483 U.S. 669, 682 (1987) ("[a] test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking would itself require judicial inquiry into, and

hence intrusion upon, military matters"); *United States* v. *Shearer*, 473 U.S. 52, 58 (1985) (barring FTCA suit alleging negligent supervision of service member because "[t]o permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions," including "whether to discharge a serviceman"). Thus, the fact that employment discrimination does not serve the military mission is beside the point. Even accepting that fact, allowing courts to entertain service-related Title VII claims—rather than permitting the military itself to address such claims through its own internal administrative processes—threatens to disrupt the "peculiar and special relationship of the soldier to his superiors," to undermine military "discipline," and to interfere with the conduct of the military mission. *Chappell*, 462 U.S. at 299 (citation omitted).

Petitioner also notes that Congress, in 42 U.S.C. 2000e-16(a), has provided that "[a]ll personnel actions affecting employees . . . in military departments . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." Pet. 21 (emphasis omitted). As noted above, however, the courts of appeals have unanimously concluded that this language does not authorize uniformed members of the armed forces to bring employment discrimination suits. See, *e.g.*, *Hodge*, 107 F.3d at 708 (citing other circuits). And EEOC regulations take the same view. See 29 C.F.R. 1614.103(d)(1).

Petitioner argues that the EEOC reviews Title VII claims brought by dual-status military technicians "with no demonstrable effect on military order." Pet. 21. That argument overlooks the fact, which petitioner else-

where acknowledges (See Pet. 22-23 n.5), that the EEOC has ruled that dual-status military technicians may obtain relief under Title VII only for discrimination that arises from their civilian capacity. Thus, the EEOC's decisions recognize that technicians may not bring a Title VII action based on any personnel decision that "affect[s] their capacity as uniformed military personnel." *Muse* v. *Geren*, EEOC Doc. 0120083293, 2008 WL 4463514, at *2-*3 (E.E.O.C. Sept. 26, 2008); accord *Brown* v. *Wynne*, EEOC Doc. 0420050011, 2007 WL 1523917, at *2 (E.E.O.C. May 16, 2007); *Snyder* v. *Roche*, EEOC Doc. 01A23583, 2003 WL 1791143, at *2 (E.E.O.C. May 26, 2003); *Conley* v. *Widnall*, EEOC Doc. 01945532, 1995 WL 81271, at *1 (E.E.O.C. Feb. 16, 1995). That standard is not materially different from the standard articulated by the court below, which is whether the employee's claim "arose out of activity incident to military service." Pet. App. 19a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2011

No. 10-638

In The Supreme Court of the United States

NANCY J. WETHERILL,

Petitioner,

v.

JOHN MCHUGH, SECRETARY OF THE ARMY; THE ARMY NATIONAL GUARD; STEVEN R. DOOHEN, BRIGADIER GENERAL, IN HIS OFFICIAL CAPACITY AS ADJUTANT GENERAL OF THE SOUTH DAKOTA NATIONAL GUARD; THEODORE JOHNSON, BRIGADIER GENERAL, IN HIS OFFICIAL CAPACITY; AND THE SOUTH DAKOTA ARMY NATIONAL GUARD,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE STATE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a dual-status National Guard technician employed under 32 U.S.C. 709 may assert claims incident to her military service under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a) against her own state National Guard and its officers.

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The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 616 F.3d 789. The order of the district court (Pet. App. 26a-39a) is reported at 644 F. Supp.2d 1135.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2010. The petition for writ of certiorari was filed on November 9, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

This case presents the question of whether a state's National Guard and its officers are required to respond to an action in federal court based on Title VII of the Civil Rights Act of 1964 brought by a National Guard dual-status military technician employed under 32 U.S.C. 709. Petitioner was required to separate from her employment as a dual-status military technician upon retirement from military service due to the application of 32 U.S.C. 709(f)(1)(a). The military decision of the South Dakota State Adjutant General which ultimately led to Petitioner's separation from her civilian employment was irreducibly military in nature making Petitioner's claims non-justiciable. Further, the military decision at issue made by the State Adjutant

General acting within the scope of powers retained by the State as a sovereign is not subject to administrative or judicial review.

a.

The National Guard is the federally recognized and organized state militia which is reserved to the states by Article I, § 8, Clauses 15 and 16 of the United States Constitution. Since the formative years of our nation each state has had a state adjutant general or equivalent to serve as the leader of that state's militia, today referred to as the state National Guard. *See* Militia Act of 1792, Ch. XXXIII, § 6.

As a reserve component of the federal military system the purpose of state National Guard units, when federalized, is to provide "[Q]ualified persons available for active duty in the Armed Forces, in time of war or national emergency, and at such other times as the national security may require, . . . " 10 U.S.C. 10102. A state's National Guard, when not federalized, is still a state militia subject to the command and control of the governor of the state and the adjutant general. *Charles v. Rice*, 28 F.3d 1312, 1315 (1st Cir. 1994). When called into active federal service members of the state National Guard become subject to the federal command authority of the President, are subject to jurisdiction under the Uniform Code of Military Justice and are assigned to duty the same as regular components of the armed forces. *See* United States Constitution Article II, § 2, Clause 1, 10 U.S.C.

802(a)(3) and 10 U.S.C. 10107, 10113. The various states have retained their sovereign right to keep and maintain a militia, recognized both by Article I, § 8, Clauses 15 and 16 of the U.S. Constitution and the Second and Tenth Amendments to the Constitution. Preexisting and inherent rights of the states in this respect have never been delegated to Congress.

b.

Military technicians have been employed by the National Guard units of the various states since the early twentieth century. These technicians received pay and benefits at various levels depending on the state National Guard unit which employed them. There was also confusion as to whether these technicians were state or federal employees for purposes of the Federal Tort Claims Act.

The issue of the Federal Tort Claims Act coverage was resolved in *Maryland v. United States*, 381 U.S. 41 (1965) when the Court held that dual-status technicians were state employees and not employees of the United States for FTCA purposes.

In order to alleviate this confusion and provide for limited federal employee status on the part of military technicians, Congress passed the National Guard Technicians Act of 1968, Pub. L. No. 90-486, 82 State. 755. An effort had been made to pass a similar act in 1967. That act would have provided full federal employee status to all National Guard technicians. The 1967 proposal failed, in part, for that very reason

based on concerns that due deference was not being paid to state sovereignty nor to the military nature of technician service. The National Guard Technicians Act of 1968 (hereafter NGTA) in its final form was intended to provide retirement and fringe benefits for workers and to recognize military requirements as well as state characteristics of the various National Guard units by providing for administrative authority and supervision at the state level. *See* H.R. Rep. No. 1823, 90th Cong., 2nd Sess. (1968). *American Fed'n of Gov't Employees v. FLRA*, 730 F.2d 1534 (D.C. Cir. 1984). (*AFGE*)

A dual-status National Guard technician is recognized and defined by 32 U.S.C. 709(b). Such technicians must be members of the National Guard, hold the military grade specified by the secretary for that position, and wear a military uniform while performing their duties. 32 U.S.C. 709(b). They are required to work as civilians in their military unit, serve as members of the military with the same or related unit and may be called into active federal service. *See AFGE*, 730 F.2d at 1545.[1]

The separation of dual-status technicians from their employment is to be effected by the state adjutant general. 32 U.S.C. 709(f)(1)-(3). 32 U.S.C. 709(f)(3) further provides that "A reduction in force, removal,

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[1] The acts complained of by Petitioner in this case did not take place during a time when she was called into active federal service.

or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned; . . . ." 32 U.S.C. 709(f)(4) describes the right of appeal arising from a technician's separation from employment by the state adjutant general: "a right of appeal which may exist with respect to paragraph (1), (2), or (3) shall not extend beyond the adjutant general of the jurisdiction concerned; . . . ."

Finally the NGTA provides that anyone employed as a dual-status technician who is separated from the National Guard or ceases to hold the military grade required shall be promptly separated from the dual-status job. 32 U.S.C. 709(f)(1)(a). Therefore, in order to continue to serve as a dual-status technician a person must continue to retain membership in a National Guard unit.

c.

The courts of appeal addressing this issue have all determined that Title VII does not apply to uniformed members of the Armed Forces and have further concluded that dual-status technicians may not assert Title VII claims based on alleged discrimination that is incident to their military service. *Hodge v. Dalton*, 107 F.3d 705, 708 (9th Cir.), cert. denied, 522 U.S. 815 (1997); *Overton v. New York State Div. of Military and Naval Affairs*, 373 F.3d 83, 96 (2nd Cir. 2004); *Brown v. United States*, 227 F.3d

295, 299 (5th Cir. 2000), cert. denied, 531 U.S. 1152 (2001); *Fisher v. Peters*, 249 F.3d 433, 443-444 (6th Cir. 2001); *Hupp v. United States Dep't of the Army*, 144 F.3d 1144, 1148 (8th Cir. 1998); *Mier v. Owens*, 57 F.3d 747, 748 (9th Cir. 1995), cert. denied, 517 U.S. 1103 (1996).

Federal Respondents in their brief in opposition have discussed the uniform conclusions reached by the various courts of appeal on this issue as well as alternate remedies available to technicians in regard to service-related discrimination. State Respondents have nothing further to add on those points. *See* Federal Respondents' Brief in Opposition, p. 5-7.

d.

Petitioner is a Japanese-American woman who began working for the South Dakota Army National Guard (SDARNG) in 1974. She was commissioned as an officer in the SDARNG on July 4, 1977. She was promoted to Colonel on July 1, 1999. During a portion of this time she was employed as a dual-status technician as defined and controlled by 32 U.S.C. 709. Pet. App. 3a.

Petitioner's mandatory retirement date (MRD) – the date she was required to retire from military service – was July 31, 2007. Because of the statutory requirements related to a dual-status technician her separation from military service made her ineligible

to serve as a dual-status technician thereafter. 10 U.S.C. 10216(a) and 32 U.S.C. 709(b), (f)(1). Pet. App. 3a.

Petitioner requested then-Adjutant General of the SDARNG (Major General Michael A. Gorman) for a discretionary waiver of her mandatory retirement date so that she could remain eligible to serve as a dual-status technician. This request was granted on May 10, 2007 and approved by the National Guard on July 18, 2007. Pet. App. 4a.

General Gorman retired as Adjutant General of the SDARNG in September 2007 and was replaced by Brigadier General Steven R. Doohen.

In January 2008 General Doohen requested the National Guard revoke the discretionary extension of Petitioner's MRD. In her complaint Petitioner admits that she was advised by General Doohen that this request was made for reasons of "force management." Pet. App. 4a, Complaint ¶ 15 at 48a. The National Guard approved General Doohen's request and Petitioner's MRD was reset to July 21, 2008. Due to the application of 32 U.S.C. 709 and 10 U.S.C. 10216(a) Petitioner then became ineligible to continue to serve as a dual-status technician. As the State Adjutant General, General Doohen had the statutory authority to make decisions regarding reduction in force, removal for cause and force management. 32 U.S.C. 709(f)(1)-(3). Because of the military command decision made by the South Dakota State Adjutant General Petitioner retired from military service

and became ineligible to continue to serve as a dual-status technician.

Appeals resulting from force management decisions end with the state adjutant general pursuant to 32 U.S.C. 709(f)(4). Petitioner first filed complaints with the National Guard's Office of Equal Opportunity and Civil Rights, alleging that she had been discriminated against based on her sex and national origin. The National Guard Bureau dismissed her administrative EEO complaints because they were found to be military in nature and thus, jurisdictionally precluded from processing via the formal federal sector enforcement process used by federal civilian employees. *See* 29 C.F.R. 1614.103(d)(1). She then filed this action in United States District Court against the Secretary of the Army, the Army National Guard, State Adjutant General Doohen, and Brigadier General
Theodore Johnson and the South Dakota Army National Guard. Her complaint alleged discrimination and retaliation based on sex and/or national origin in alleged violation of Title VII, 42 U.S.C. 2000E-2(a)(1). *See* Pet. App. 4a-5a.

e.

The discussion of the actions in the courts below contained in the Federal Respondents' Brief in Opposition, p. 9-12, accurately describes the rationale and holdings of both the district court and the court of

appeals. State Respondents have no further comment on that subject.

ARGUMENT

Petitioner advances two arguments in support of her contention that this Court should grant review. First, Petitioner alleges that there are two splits among the federal courts of appeals on whether and if so how the *Feres* doctrine applies to dual-status technicians who allege employment discrimination and secondly that no doctrine such as *Feres* may be applied to affect the rights of a "federal civilian employee." Principles of the Second, Tenth and Eleventh Amendments to the United States Constitution as well as significant and consistent case law support the conclusion that a state adjutant general who exercises authority as commander of the state's militia respecting members of the militia who are not then in federal service must be free from federal restraint including free from being required to respond to claims under Title VII. In addition, no conflict among the courts of appeals exists. All courts of appeals which have addressed the issue have determined that Title VII claims asserted by dual-status technicians are ultimately non-justiciable. Finally, the Petitioner's civilian employment had a military predicate which can and in this case was affected by a command and control decision of the state adjutant general. No intervention by the federal courts is recognized or permitted. The State Respondents

therefore respectfully request that the petition for writ of certiorari be denied.

1. Present state National Guard units are the modern militia which was reserved to the states by the Second Amendment and by Article 1, § 8, Clauses 15 and 16 of the United States Constitution. This was recognized in *Maryland v. United States*, 381 U.S. 41, at 45-46. Although the National Guard in various states is now " . . . uniformed, equipped, and trained . . . " much like the regular Army the governor of the state remains in charge of the National Guard except when the guard is called into active federal service. The guards in the various states are administered by the governor through state adjutant generals. *Maryland v. United States*, 381 U.S. 41 at 46. This situation remains true today. The power of the state to train and govern its own militia has never been delegated to Congress and therefore is reserved to the states under the Tenth Amendment and recognized explicitly in the Second Amendment.

The Tenth Amendment reserves to the states all inherent attributes of sovereignty not explicitly given up elsewhere in the Constitution. *Gibbons v. Ogden*, 22 U.S. 1, 33-34 (1824). Among these inherent attributes of sovereignty is the right of the states to organize, maintain, train and discipline its own militia. The Second Amendment was adopted in part because of concerns that the power of Congress to disarm the state militia and create a national standing army was a threat to the states. *District of Columbia v. Heller*, 554 U.S. 570, 637 (Stevens, J., dissenting), citing

United States v. Miller, 307 U.S. 174 (1939). In Second Amendment cases this Court has always agreed that at a minimum the Second Amendment reserves to the states the right to maintain, train and discipline its own militia forces when those forces are not in active federal service. *Perpich v. United States*, 496 U.S. 334, 343, 347-48 (1990).

Federal courts and federal agencies are therefore explicitly restrained by the Tenth Amendment from second guessing a state adjutant general's command and control decision with respect to his state's militia forces.

There is therefore a solid constitutional basis for those provisions in the NGTA which limit appeals resulting from adverse employment actions to the state adjutant general. The statutory language in 32 U.S.C. 709(f) confirms that any actions or decisions described in 709(f)(3) including reductions in force, removal and adverse actions involving discharge from technician employment may be appealed only through the state's adjutant general. Permitting review of such a decision by a federal court or agency would contravene inherent attributes of sovereign rights implicitly reserved to the states by the Tenth Amendment. It would likewise contravene the Constitution's explicit reservation to the states in the Second Amendment of the authority retained by them to

organize, maintain, train, and discipline their militia forces.[2]

Dual-status technicians were statutorily defined and recognized by the NGTA, 32 U.S.C. 709. Supported by solid constitutional underpinnings the NGTA recognized the inherent state sovereignty over its own militia, or National Guard.

The NGTA was enacted by Congress for a limited purpose:

> a) [t]o provide a retirement and fringe benefit program which will be both uniform and adequate;
>
> b) [t]o recognize the military requirements of the State characteristics of the National Guard by providing for certain statutory administrative authority at the state level with respect to the technician program;
>
> c) [t]o clarify the technician's legal status which in certain areas has been the subject of conflicting court decisions, especially in the matter of whether technicians are covered under the Federal Tort Claims Act regarding third party actions against the U.S. government. *See* H.R. Rep. No. 1823, 90th Cong., 2nd Sess. (1968).

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[2] The analysis based on the Second and Eleventh Amendment and South Dakota's inherent sovereign immunity in this area distinguishes this case from the petition presented by the Air Force Reserve technician in *Zuress v. Donley*, 606 F.3d 1249 (9th Cir. 2010) pet. for cert. pending No. 10-374 (filed Sept. 16, 2010).

Congress was careful to recognize the authority of the respective states in the NGTA. The Secretary of the Army was directed to designate that the state adjutants general employ and administer the technicians. 32 U.S.C. 709(d). Technicians are required to be members of the National Guard in order to maintain their eligibility to serve as a technician. 32 U.S.C. 709(b). The state adjutant general is made responsible for separating technicians from their employment as a result of a variety of events including decisions based on reduction in force, etc. 32 U.S.C. 709(f)(1)-(3). Finally the Act itself provides that the right of appeal from such personnel actions does not extend beyond the adjutant general. 32 U.S.C. 709(f)(4).

Not only does the doctrine of intra-military immunity as enunciated in *Feres v. United States*, 340 U.S. 135 (1950) apply to render Petitioner's claims non-justiciable but the doctrine of sovereign immunity as recognized in the United States Constitution applies to prevent the SDARNG and its officers from being subject to claims in federal court based on a military command decision made by the state adjutant general. The *Feres* doctrine supports and supplies a justification for the rulings in both the district court and the court of appeals. However, further justification exists based on the well-grounded position that the various states have retained the sovereignty to control their own National Guard and should be free from outside intervention in regard to state military decisions.

2. Petitioner was required to maintain her status in the National Guard as a prerequisite to employment as a dual-status National Guard technician under 32 U.S.C. 709(b). Her civilian employment therefore had a military predicate. When the state adjutant general made a command and control decision that effectively ended Petitioner's military career it had the concomitant effect of requiring her separation from employment as a dual-status technician.

A state National Guard includes its own internal military command and control structure and is responsible to the state adjutant general and then to the governor of the state. Maintaining its own National Guard is likely the most clearly ascertainable remaining state sovereign autonomous function of the various individual states. The NGTA recognized this by reserving and recognizing the role of state adjutants general in administering and employing technicians at the state level. 32 U.S.C. 709(d) and (f) solidified the authority of those officials by prohibiting appeals of personnel actions beyond the state adjutants general. 32 U.S.C. 709(f)(4). Subsequent legislation has recognized and confirmed that dual-status technicians are federal employees who are uniquely employed – hired, fired and disciplined – by the state adjutant general. The Court in *AFGE* recognized that such technicians are "nominal federal employees" who should not be analogized to any other federal employees except with regard to federal benefits and tort claims coverage, and further recognized: "The employment, discipline and discharge of

technicians remains completely with the state officials, and their day to day activities on the job are controlled at the state level." 730 F.2d at 1534, 1537-38. For these reasons, the court of appeals in *AFGE* rejected the contention that the adjutant general of the state of Nebraska be required to engage in collective bargaining regarding reduction in force decisions.

In *Alexander v. United States*, 143 Fed. Appx. 340 (2005), the Court held that the NGTA confirmed that state adjutants general have exclusive jurisdiction over appeals by dual-status National Guard technicians who have been separated from civilian employment for loss of membership in the National Guard – exactly the same situation faced by Petitioner here.

The Court of Appeals for the Federal Circuit has concluded that the provisions of 32 U.S.C. 709(f)(3) and (f)(4) should be applied literally. That is, there is no appeal from any adverse action involving discharge from technician employment other than to the adjutant general of the jurisdiction involved. *Singleton v. Merit Systems Protection Board*, 244 F.3d 1331, 1334 (Fed. Cir. 2001), and *Dimanni v. Rhode Island Army National Guard*, 62 Fed. Appx. 937, 941 (Fed. Cir. 2003). Both decisions affirmed the dismissal of dual-status technician claims to the Merit Systems Protection Board for lack of jurisdiction and failure to state a claim.

Courts have long recognized that military dual-status technicians are somewhat of a hybrid who are federal civilian employees but work in a military

environment and under the immediate control of state officers. *New Jersey Air National Guard v. Federal Labor Relations Authority*, 677 F.2d 276 (3rd Cir. 1982): "This (hybridized) role does not fit neatly within the scope of either state or national concern; historically the Guard has been, and today remains, something of a hybrid. Within each state the National Guard is a state agency, under state authority and control. At the same time, the activity, makeup and function of the Guard is provided for, to a large extent, by federal law." *Johnson v. Orr*, 780 F.2d 386, 388 (3rd Cir. 1986).

3. The Constitution does not provide for federal jurisdiction over suits against nonconsenting states. *Kimel v. Fla. Bd. Of Regents*, 528 U.S. 62, 73 (2000), *citing, College Savings Bank v. Florida Prepaid Post Secondary Ed. Expense Bd.*, 527 U.S. 666, 669-70 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). State Respondents recognize that the Eleventh Amendment is limited by the enforcement provisions of § 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) and that Congress may abrogate the Eleventh Amendment without a state's consent pursuant to its power to enforce provisions of the Fourteenth Amendment. Such intention to abrogate the Eleventh Amendment must be made unmistakably clear in the language of the statute.

Congress has affirmatively proscribed federal jurisdiction over claims that may be made by National

Guard dual-status technicians because the states retain inherent rights of sovereignty in matters concerning the organization, maintenance, training and discipline of their own militia forces. Rather than an unequivocal congressional abrogation of the state sovereignty in this area Congress has plainly indicated in the organic act which governs the National Guard that appeals of decisions concerning technicians' employment shall not lie beyond the state's adjutant general. 32 U.S.C. 709(f)(3) and (f)(4) provide:

> Notwithstanding any other provision of law . . . a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned." and further, that "a right of appeal which may exist with respect to paragraph . . . (3) shall not extend beyond the adjutant general of the jurisdiction concerned.

A more explicit provision of Congress' intent to preserve the state's Eleventh Amendment immunity and retained constitutional powers in this area is difficult to imagine.

State Respondents recognize that the federal government has authority to enforce compliance by states with anti-discrimination legislation. In complaints of discrimination in the context of Title 32 National Guard matters are addressed by 42 U.S.C.

2000(d). Although an individual cause of action does not exist for National Guard personnel, the enforcement mechanisms under this statutory provision allow the federal government to ensure that the states, in their various organizational capacities, do not engage in the types of discrimination made unlawful by Title VI of the Civil Rights Act.

Under the facts and circumstances which exist, abrogation of South Dakota's sovereign immunity should not be permitted. South Dakota retains such immunity in regard to the exercise of those preexisting and fundamentally inherent attributes of sovereignty preserved by the implicit promise of the Eleventh Amendment and other constitutional provisions.

4. State Respondents agree with Federal Respondents' brief in opposition in regard to the contention that the 1997 amendments to 10 U.S.C. 10216(a) change in any way the definition of dual-status military technicians under 32 U.S.C. 709 or create any new cause of action on behalf of such technicians. The court below rejected this same argument by Petitioner and so has every court of appeals who have addressed the question. *See, e.g., Bowers v. Wynne*, 615 F.3d 455, 466-68 (6th Cir. 2010); *Zuress v. Donley*, 606 F.3d 1249, 1254-55 (9th Cir. 2010) pet. for cert. pending No. 10-374 (filed Sept. 16, 2010);[3] *Walch v. Adj.*

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[3] State Respondents note that the petitioner in *Zuress v. Donley* was employed as a dual-status Air Force Reserve technician, not

(Continued on following page)

Gen.'s Dep't, 533 F.3d 289, 299-301 (5th Cir. 2008); and *Williams v. Wynne*, 533 F.3d 360, 366-68 (5th Cir. 2008).

CONCLUSION

A military command decision made by a state adjutant general goes to the fundamental inherent and retained rights of sovereignty arising from the unique states rights to maintain, train and discipline their own militia. This is totally consistent with the doctrine as enunciated in *Feres* but goes further and is based on constitutional and historical support. It provides even further justification for the non-justiciability of the claims asserted by Petitioner in the federal courts.

The determination as to who should serve as an officer in the state National Guard is a decision to be made by that state's adjutant general, who is responsible to the governor. The NGTA recognizes this. This concept when viewed in light of the powers reserved to the various states renders Petitioner's claims non-justiciable as does the application of the *Feres* doctrine.

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a National Guard technician. This renders some of State Respondents' arguments inapplicable to the pending petition in *Zuress*. *See also* Section 10216(a).

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 24 2011
OFFICE OF THE CLERK

No. 10-638

IN THE

Supreme Court of the United States

NANCY J. WETHERILL,
Petitioner,

v.

JOHN MCHUGH, SECRETARY OF THE ARMY; THE ARMY NATIONAL GUARD; STEVEN R. DOOHEN, BRIGADIER GENERAL, IN HIS OFFICIAL CAPACITY AS ADJUTANT GENERAL OF THE SOUTH DAKOTA NATIONAL GUARD; THEODORE JOHNSON, BRIGADIER GENERAL, IN HIS OFFICIAL CAPACITY; AND THE SOUTH DAKOTA ARMY NATIONAL GUARD,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondents acknowledge that the lower courts have split in two different ways over the question whether dual-status technicians in the National Guard can bring discrimination claims under *Feres v. United States*, 340 U.S. 135 (1950), and its progeny. First, the courts of appeals disagree whether the plain language of 10 U.S.C. § 10216(a) permits such suits by expressly defining dual-status technicians as "Federal civilian employee[s]" for "any . . . provision of law." Second, the courts rejecting such an interpretation disagree over when dual-status technicians may sue.

Respondents nevertheless oppose review. They argue that the first split is illusory because the courts of appeals have applied their conflicting readings of § 10216 to different statutes and that, in any event, the split will resolve itself. But neither argument is persuasive. The split is real – as the courts of appeals have themselves repeatedly stated. And it will continue to fester absent this Court's intervention; indeed, the split began with an express acknowledgment by the Federal Circuit that other circuits had reached contrary conclusions.

Respondents argue that the second split has not proven outcome-determinative and that this case is a poor vehicle for review. But these arguments likewise fail. Outside the Eighth Circuit, courts have allowed claims much like petitioner's here to proceed under *Feres* – a fact that refutes both of respondents' contentions. Accordingly, this Court should grant review to resolve the fractured approaches of the courts of appeals on this issue of recurring importance.

I. Respondents Do Not Dispute That The Courts Of Appeals Disagree Whether 10 U.S.C. § 10216(a) Bars Application Of The *Feres* Doctrine Or That This Case Is An Appropriate Vehicle To Resolve The Split.

Respondents agree: the courts of appeals have reached opposite conclusions regarding whether the *Feres* doctrine should apply to discrimination claims brought by dual-status technicians – a group that Congress has classified as "Federal civilian employees" for purposes of "any . . . provision of law" in 10 U.S.C. § 10216(a)(1). See Br. For Fed. Resp'ts In Opp'n ("BIO"), 10 (recognizing that the Federal Circuit held in *Jentoft v. United States*, 450 F.3d 1342 (Fed. Cir. 2006), that *Feres* does not apply to dual-status technicians in light of the statute); *id.*, 14 (citing decisions of the Second, Fifth, Sixth, Eighth and Ninth Circuits rejecting this approach). And respondents do not dispute that this case presents an appropriate vehicle to clarify the meaning of § 10216.

Instead, respondents oppose certiorari on other grounds: (1) no real conflict exists because the Federal Circuit applied its construction of § 10216 to a claim arising under the Equal Pay Act, 29 U.S.C. § 206 ("EPA"), rather than Title VII; (2) the Federal Circuit will reverse its position once it considers the legislative history of § 10216; and (3) the Federal Circuit is wrong on the merits. Respondents are wrong: the split is real, it is unlikely to resolve on its own, and the parties' debate over the merits simply highlights the need for this Court's review.

A. The Split Over § 10216 Is Real.

Respondents maintain that the courts of appeals are not really divided; that, although the courts have disagreed over the interpretation of § 10216(a), they have done so in different contexts: "the Federal Circuit relied on 'the plain language of the Equal Pay Act,' which defines a covered employee to include 'any individual employed by the Government of the United States . . . as a civilian in the military departments,'" while other courts have applied § 10216(a) in the context of Title VII, which "contains no such language." BIO, 17-18. This argument is wrong for several reasons.

First, the courts of appeals themselves believe they are in conflict. Indeed, in *Jentoft* the Federal Circuit *expressly* disagreed with the decisions of other courts of appeals in *Title VII* cases brought by dual-status technicians. It acknowledged that the First, Fifth, and Sixth Circuits had dismissed claims brought by dual-status technicians "under other similar discrimination statutes," including Title VII. See 450 F.3d at 1349. It did not try to reconcile its reasoning with those decisions; it disagreed with them. See *id.* Thus, *Jentoft* was not based on the EPA's language, as respondents here suggest; rather, it was expressly based on "the plain language of § 10216(a)." *Id.* Most of the other courts of appeals likewise believe the split is real. See, *e.g.*, Pet. App. A, 12a ("[T]wo of our sister circuits have considered and rejected the reasoning of *Jentoft*.").

Second, respondents' argument fails as a matter of logic. Its premise – that the EPA and Title VII have meaningfully different language – is flawed. True, the EPA covers "'any individual employed . . . as a

civilian in the military departments,'" as respondents point out. BIO. 17 (quoting *Jentoft*, 450 F.3d at 1348). Title VII similarly covers "[a]ll personnel actions affecting employees . . . in military departments." 42 U.S.C. § 2000e-16(a). If anything, this language is broader than the EPA, as it is not expressly limited to "*civilian[s]* in the military departments." However, the courts have read this same limitation into Title VII. *E.g.*, *Brown v. United States*, 227 F.3d 295, 298 (5th Cir. 2000) ("[T]his waiver has been understood to apply only to suits by civilian employees of the military departments . . . ."). The statutes are thus identical in scope, and because – as respondents argue – "Congress is presumed to be familiar with established case law" when it acts, BIO. 15, its enactment of § 10216 must be understood to have an identical effect on suits under both the EPA and Title VII. Most courts of appeals thus have felt it necessary to reject rather than distinguish *Jentoft* in deciding whether § 10216 authorizes suit by dual-status technicians.

Accordingly, respondents' attempt to distinguish *Jentoft* is rejected by both precedent and logic, and presents no reason to deny review.

B. The Circuits Are Not Likely To Resolve The Split On Their Own.

Respondents alternatively argue that this Court should tolerate the "tension" among the circuits because the Federal Circuit may repudiate its five-year-old decision in *Jentoft*. BIO. 18. They claim the Federal Circuit failed to "consider the legislative history of the 1997 amendments" to § 10216(a) and lacked "the benefit of the analysis" of the other courts of ap-

peals that subsequently disagreed with *Jentoft*. *Id.* This speculation is unpersuasive.

Indeed, the Federal Circuit already considered (and rejected) a legislative-history argument substantially similar to the one presented here. The government argued in *Jentoft* that the "legislative history of the Technician Act" supported its view that "intended that dual status technicians . . . would be subject to the same military authority and discipline as other National Guardsmen," see Br. for Def.-Appellee, *Jentoft*, 450 F.3d 1342 (Fed. Cir. Nov. 17, 2005) (No. 05-5125), 2005 WL 3517988, *35-36, though it did not specifically address the history of the 1997 amendment. The Federal Circuit was not persuaded. See 450 F.3d at 1347 (noting the legislative-intent argument). It instead felt bound to follow the "clear direction" from the "broad and unambiguous language" of § 10216(a). *Id.* at 1349. This analysis is unsurprising, as a court faced with a "straightforward statutory command" has "no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997). Thus, respondents' theory that the Federal Circuit would reverse itself if presented with additional legislative history is wishful thinking.

Respondents also err in contending the Federal Circuit will seek harmony with its sister circuits. Notably, the argument belies respondents' earlier, equally uncompelling argument – that *Jentoft*'s logic is limited to the EPA. Were *Jentoft* so limited, the Title VII decisions of other courts would not have any meaning for the Federal Circuit. But, in any event, the Federal Circuit was expressly "mindful" that it was contradicting the Title VII decisions of "other cir-

cuits" in holding that § 10216(a) allows dual-status technicians to sue notwithstanding *Feres*. 450 F.3d at 1349. And it was just as clear that it was not persuaded by this contrary authority; rather, it felt "enjoined" to apply "the plain language of § 10216(a)" in spite of it. *Id.* Nothing suggests the Federal Circuit would stand any less firm in its convictions today.

Accordingly, only this Court's review will resolve disagreement over the meaning of § 10216(a).

C. Respondents' Merits Arguments Are Wrong And Simply Highlight The Need For Review.

Respondents' main argument is that *Jentoft* was wrongly decided, relying almost exclusively on the decisions of the other courts of appeals. See BIO, 2-5, 14-17 (setting forth legislative history and arguing merits). This is not an argument against granting the petition; just the opposite. Respondents' heavy reliance on court of appeals decisions underscores that there is no definitive guidance from this Court on the question presented. It also shows that the split is mature – the courts of appeals have explored the issues at length and staked out their positions, leaving little to be gained by further percolation.

In any event, respondents' arguments lack merit. They first argue that § 10216 contains no "clear statement" that waives sovereign immunity for Title VII claims. BIO, 13-15. But none is needed; Title VII already expressly waives sovereign immunity for civilians in military departments. See 42 U.S.C. § 2000e-16(a); see, *e.g.*, *Thompson v. McHugh*, 388 F. App'x 870, 872 (11th Cir. 2010) ("Title VII waives sovereign immunity . . . .").

Instead, the question here is whether § 10216(a) defines a dual-status technician as a "civilian." It clearly does. It states that technicians are "Federal civilian employee[s]" for "any . . . provision of law." No broader or clearer statement could be made; indeed, as this Court recently held, "the word 'any' (in the phrase 'any other provision of law') has an 'expansive meaning.'" *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2189 (2009) (internal citation omitted); *accord Jentoft*, 450 F.3d at 1349 (applying "broad and unambiguous" language of § 10216(a)).

Respondents resist this analysis, arguing that § 10216(a) is not as clear as it seems because it "'[goes on to] state[] that National Guard technician . . . are 'dual status' employees because they are federal civilian employees *and* members of the reserve forces.'" BIO, 16 (citation omitted). But respondents' attempt to find ambiguity in the statute fails. True, the statute *identifies* dual-status technicians as those employees who, among other things, must "maintain membership in the Selective Reserve." 10 U.S.C. § 10216(a)(1)(B). But it in turn *defines* dual-status technicians to be "Federal *civilian* employee[s]" for "any" provision of law. *Id.* § 10216(a)(1) (emphasis added). And § 10216(a)(2) further clarifies that dual-status technicians "shall be authorized and accounted for as a separate category of *civilian employees*" (emphasis added).

Respondents finally argue that the legislative history of § 10216 shows Congress's only purpose was to clarify "nomenclature." BIO, 17. Not so. The relevant history shows little of Congress's intent one way or the other – it is two sentences long and cites unexplained "inconsistencies" in laws defining "military

technician" as a reason for its enactment. This cursory reference is not elaborated; nor does it suggest that this is the exclusive purpose. H.R. Rep. 105-132, 358 (1997). But even assuming respondents' reading is plausible, resort to legislative history is improper when the statutory language is so clear, as this Court has repeatedly held. See, *e.g.*, *Beaty*, 129 S. Ct. at 2191. The same rule applies to contentions that Congress has "painted with too broad a brush" or that clear language has "unintended consequences." *Olden v. LaFarge Corp.*, 383 F.3d 495, 506 (6th Cir. 2004).

At best, respondents present the other side of these arguments; because the courts of appeals have taken both sides, however, only this Court can definitively resolve the merits.

II. The Court Should Resolve The Outcome-Determinative Disagreement Among Lower Courts Over When Claims By Dual-Status Technicians Are Barred By *Feres*.

Respondents also agree that lower courts disagree on the standard for deciding whether *Feres* bars claims by dual-status technicians. According to respondents, the "vast majority" of courts follow an approach that bars claims that "ar[i]se out of activity incident to military service," BIO, 18, while the Sixth Circuit applies "a categorical bar" to claims by dual-status technicians, *id.* at 19. Nonetheless, respondents resist review on two grounds: (1) the split is not outcome-determinative; and (2) this case is not a proper vehicle for review. Neither argument has merit.

A. The Split Is Outcome-Determinative.

Respondents first err in arguing that there is no "evidence that divergent approaches among the courts of appeals are resulting in divergent outcomes." BIO, 19. Indeed, in a footnote, respondents concede the opposite, acknowledging that "a single district court decision" has "allowed a dual-status technician's Title VII claim to proceed." *Id.* at 19 n.5. Instead, what respondents really appear to be arguing is that the Court should not grant review to resolve a split between one district court and the courts of appeals.

That argument is a red herring, as other courts have similarly allowed Title VII suits by dual-status technicians to proceed. Just recently, the U.S. District Court for the Northern District of Texas held that a hostile-work-environment claim by an air reserve technician could proceed under the Fifth Circuit's "clearly civilian" approach to *Feres*. *Filer v. Donley*, No. 4:10-CV-310-A, 2011 WL 196169, at *1 (N.D. Tex. Jan. 20, 2011); see also Pet., 10 (identifying Fifth Circuit test). The court distinguished other cases holding Title VII claims nonjusticiable, concluding that a "hostile work environment" claim can be "safely adjudicate[d] . . . without having to review military personnel decisions." 2011 WL 196169, *4. *Filer* demonstrates that the Fifth Circuit's test is outcome-determinative – such a claim would necessarily be rejected as barred by *Feres* under the Sixth Circuit's "categorical" approach. And petitioner's retaliation claim could plainly be adjudicated under the Fifth Circuit's approach, since it does not bear on "military personnel decisions."

Moreover, at least one court allowed retaliation claims by a dual-status technician under Title VII – much like the claim presented here. See Pet., 4-5. In *Hunter v. Stetson*, 444 F. Supp. 238, 238-39 (E.D.N.Y. 1977), a dual-status technician alleged that his military rank in the National Guard was reduced in retaliation for his assistance in helping a civilian coworker file a discrimination complaint against the Guard. The district court held that the technician asserted a cognizable claim under Title VII because the "decision-making in the military sphere has allegedly been polluted by retaliatory motive with respect to the civilian sphere" and the "military disciplinary action [] had an impact on his civilian employment." *Id.* at 240.

These cases demonstrate the circuits' disagreement over *Feres* has a decisive impact, and they underscore the need for this Court's review. If respondents mean to argue that review is inappropriate solely because the divergent approaches have not yet produced different outcomes in the courts of appeals, this argument lacks merit. This Court has previously granted review of "novel" and "important" issues that "appear[] likely to recur," even when disagreement is limited to the district courts. See *Newport v. Fact Concerts*, 453 U.S. 247, 257 & n.14 (1981); Eugene Gressman et al., *Supreme Court Practice* § 4.8, 257 (9th ed. 2007). It should do so here as well. The question here is important: it relates to the jurisdiction of the federal courts and the right of individuals to seek a remedy for discriminatory conflict that Congress has unambiguously determined to be unlawful, even in the "military departments." The disagreement is substantial, particularly in light of the other split on

this issue. One court of appeals would always allow dual-status technicians to sue; one would never allow such suits; and others would allow them only under certain circumstances as dictated by competing analytical frameworks.

Accordingly, respondents are wrong that the admitted split is not outcome-determinative.

B. This Case Is A Proper Vehicle To Resolve The Split.

Respondents' alternative argument that petitioner's suit is a poor vehicle because it "would not be cognizable in any circuit," BIO, 19, likewise fails. It overlooks an important part of petitioner's claim: that her supervisor retaliated against her for submitting a formal EEO complaint. As punishment for complaining about discriminatory treatment, petitioner was assigned to perform her duties in a condition akin to solitary confinement in the workplace. See Pet., 4. Even if other aspects of her claims might "not be cognizable in any circuit," the retaliation claim likely would be. One district court has allowed such a claim, *Hunter*, 444 F. Supp. at 240, and two district courts have allowed hostile-work-environment claims that, like petitioner's retaliation claim, could be "safely adjudicate[d] . . . without having to review military personnel decisions." *Filer*, 2011 WL 196169, *4; see *Laurent v. Geren*, Civ. No. 2004-0024, 2008 WL 4587290, at *3 (D.V.I. Oct. 10, 2008).

In addition to the conflicts in the courts of appeals on how and when *Feres* bars discrimination claims by dual-status technicians, petitioner has also noted a more fundamental problem – the applicability of

Feres in this context at all. As to that more basic question, respondents maintain that the courts of appeals are uniform. BIO, 20-21. But this Court has not hesitated to correct a uniformly erroneous interpretation of a matter of recurring importance. See, *e.g.*, *Afroyim v. Rusk*, 387 U.S. 253, 255-56 (1967) (granting certiorari in light of criticism of ten-year-old decision by commentators and dissenting opinions).[1] In any event, the (erroneous) uniformity of the lower courts on the threshold *Feres* question stands in stark contrast to their clear division over the important question of the meaning of § 10216, which is squarely presented in this case.

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[1] Indeed, respondents offer no defense of discrimination as a tool of military order, except to say that judicial review would threaten the "special relationship" between soldier and superior. BIO, 20-21. But no support is cited, and no response offered to the commentators who have rejected extension of this theory to dual-status technicians. See Pet., 8, 19-21.

CONCLUSION

For the foregoing reasons and for those set forth in the opening brief, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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February 24, 2011

Supreme Court, U.S.
FILED
APR 27 2011
CLERK

No. 10-638

IN THE

Supreme Court of the United States

NANCY J. WETHERILL,
Petitioner,

v.

JOHN MCHUGH, SECRETARY OF THE ARMY; THE ARMY NATIONAL GUARD; STEVEN R. DOOHEN, BRIGADIER GENERAL, IN HIS OFFICIAL CAPACITY AS ADJUTANT GENERAL OF THE SOUTH DAKOTA NATIONAL GUARD; THEODORE JOHNSON, BRIGADIER GENERAL, IN HIS OFFICIAL CAPACITY; AND THE SOUTH DAKOTA ARMY NATIONAL GUARD,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO STATE RESPONDENTS' BRIEF IN OPPOSITION

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THE WRIT SHOULD BE GRANTED

Petitioner established in the petition and the reply that an irreconcilable split is presented by this case – whether dual-status technicians are civilian employees who may raise Title VII claims. Petitioner also established the related split whether, even if *Feres* is applicable (contrary to what the Federal Circuit has held is the meaning of the plain language of the dual-status technician statute), a Title VII claim nevertheless can be brought by a dual-status technician when the claim is not "incident to military service."

State respondents do not dispute the irreconcilable splits on these issues; indeed, they do not even address them. Instead, they argue that their role in terminating petitioner – even if discriminatory – is shielded from scrutiny by sovereign immunity under a combination of the Second, Tenth, and Eleventh Amendments. This argument, however, fails to state a compelling basis for denying review. First, state respondents' argument says nothing at all about the claims against federal respondents; it applies only to state respondents and can, if necessary, be addressed in the first instance on remand after the threshold issue is resolved. Second, state respondents' argument is waived because it was not presented in the court of appeals. Third, state respondents' argument is meritless – it is meritless regarding the Eleventh Amendment because, as this Court has squarely held, Congress abrogated sovereign immunity in enacting Title VII; and it is meritless regarding the Second and Tenth Amendments because state respondents' contentions lack support in precedent or constitutional principle.

1. State respondents' brief simply does not address the split in authority over the question presented by this case: whether the claims of a dual-status National Guard technician alleging employment discrimination under Title VII of the Civil Rights Act of 1964 are jurisdictionally barred by the doctrine of *Feres v. United States*, 340 U.S. 135 (1950), and its progeny. See Pet. i, 8-12; see also State's Brief in Opposition ("SBIO") 6 (adopting federal respondents' arguments by reference). As set forth in petitioner's prior briefing, this case implicates two separate and square splits in the lower courts over the application of the *Feres* doctrine to dual-status technicians – whether *Feres* applies at all to dual-status technicians and, if so, how. The splits are important and entrenched, and they continue to produce divergent results in the lower courts. They also affect a large body of federal employees – nearly 70,000 in number. See H.R. Rep. 111-288 § 413, at 79 (2009). For these reasons, the Court should grant review and resolve this important issue.

2. Nor does state respondents' brief present any argument that would justify denial of the petition. State respondents raise arguments that apply only to them – not to federal respondents. See SBIO 18 n.3 (acknowledging that their arguments could not be raised by federal officials). Thus, if the Court granted review and petitioner prevailed, that decision would have an outcome-determinative effect on her ability to proceed against federal respondents. To the extent state respondents have an additional defense, they would be free to present it below. Notably, the defense proffered in state respondents' brief sounds in sovereign immunity and is not a jurisdictional question. See, *e.g.*, *Wis. Dep't of*

Corrections v. Schacht, 524 U.S. 381, 389 (1998) (state can waive Eleventh Amendment immunity by its conduct of litigation). Thus, the district court proceeded properly in first addressing the controlling *Feres* issue – which it thought to be jurisdictional in nature. Pet. App. B, at 38a. In similar circumstances in other cases, this Court has resolved threshold jurisdictional questions and remanded for further consideration of other potential defenses. See, *e.g.*, *Verlinden B.V. v. Cen. Bank of Nigeria*, 461 U.S. 480, 497-98 (1983) (determining that the grant of jurisdiction in the Foreign Sovereign Immunities Act was constitutional and then remanding the case to the court of appeals to consider claim of sovereign immunity in the first instance).[1]

3. State respondents' sovereign-immunity argument is waived. State respondents made no sovereign-immunity argument at all in their eight-page brief before the court of appeals. There is no question that while the "Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense *should it choose to do so*," the "State can waive the defense." *Schacht*, 524 U.S. at 389. It is a

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[1] In an apparent effort to avoid review, state respondents also suggest their arguments would be "inapplicable" to another petition before the Court. SBIO 18 n.3 (citing *Zuress v. Donley*, No. 10-374 (filed Sept. 16, 2010)). But state respondents' arguments are just as "inapplicable" to the federal respondents in this case. Moreover, the instant case presents a second, important split squarely and prominently: whether, even if *Feres* applies, Title VII claims by dual-status technicians may be brought when the discrimination claims are not incident to military service. See Pet. 9-12, 17-23.

settled principle that a state's waiver of sovereign immunity may be "effected by litigation conduct." *Lapides v. Bd. of Regents*, 535 U.S. 613, 620 (2002). And "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them," *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) (citation and internal quotation marks omitted) (declining to address question whether Congress had exceeded its authority under § 5 of the Fourteenth Amendment), even when the issue was presented in the district court, see, *e.g.*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 148 n.2 (1970) (declining to consider an issue that the party raised in the district court but abandoned on appeal).[2]

4. State respondents' argument also is clearly wrong on the merits. It is well established that "Congress . . . abrogat[ed] States' sovereign immunity in Title VII of the Civil Rights Act of 1964." *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003). State respondents acknowledge this fundamental point, SBIO 17-18, but argue that the "facts and circumstances" of this case warrant a unique exception

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[2] Waiver applies here with particular force to the extent state respondents raise distinct defenses under the Second and Tenth Amendments, see SBIO 10-11. These amendments were never invoked at all below, either in the court of appeals or the district court. With regard to the Eleventh Amendment, the state raised it in the district court, see Defs. Steven R. Doohen, Theodore Johnson, and the S.D. Army Nat'l Guard's Mem. in Supp. of Mots. to Dismiss, D.10, at 4, *Wetherill v. Geren*, No. 5:08-cv-5077-KES (D.S.D. filed Nov. 26, 2008), but never raised it in the court of appeals.

for state adjutants general in light of "those preexisting and fundamentally inherent attributes of sovereignty preserved by the implicit promise of the Eleventh Amendment and other constitutional provisions," specifically the Second and Tenth Amendments and the Militia Clauses of the Constitution. SBIO 18. But petitioner is aware of no case that has ever so held – and state respondents cite none.[3] In contrast, a number of courts have considered Title VII claims brought by National Guard employees against state defendants. See, *e.g.*, *Meister v. Tex. Adjutant Gen.'s Dep't*, 233 F.3d 332, 338 (5th Cir. 2000) (reversing dismissal in suit brought by civilian state employee alleging sexual harassment); *Thornton v. Coffey*, 618 F.2d 686, 690 (10th Cir. 1980) (affirming judgment in favor of national guardsman bringing Title VII claim for racial

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[3] As state respondents' own authority acknowledges, the Militia Clauses do not strengthen the argument. This Court rejected similar claims of state primacy over the militia in *Perpich v. U.S. Dep't of Def.*, 496 U.S. 334 (1990). See SBIO 11 (citing *Perpich*). In *Perpich*, the Governor of Minnesota argued that Congress violated states' rights by authorizing the President to order members of the National Guard to active duty outside the United States during peacetime, relying chiefly on the Militia Clauses and the history behind them. 496 U.S. at 336. This Court rejected the argument, explaining that, "far from being a limitation on [Congress's] powers" (as is asserted in this case), "the Militia Clauses are – as the constitutional text plainly indicates – additional grants of power to Congress." *Id.* at 349. Two of the express grants of power are the authority to "'disciplin[e]'" and "'prescrib[e]'" discipline for the militia. *Id.* at 350 (quoting U.S. Const. art. I, § 8, cls. 15-16).

discrimination against National Guard); *Moore v. Pa. Dep't of Mil. & Veterans Affairs*, 216 F. Supp. 2d 446, 452 (E.D. Pa. 2002) (explaining that while Title VII does not abrogate sovereign immunity as to claims by military members of the National Guard, it does abrogate sovereign immunity as to Title VII claims brought by civilian employees in the National Guard against state defendants); *Hunter v. Stetson*, 444 F. Supp. 238, 239-40 (E.D.N.Y. 1977) (rejecting motion to dismiss Title VII claim against state officials brought by member of New York Air National Guard member); *Napper v. Schnipke*, 393 F. Supp. 379, 385 (E.D. Mich. 1975) (granting relief to a mechanic in the Michigan Air National Guard against state adjutant general under Title VII); see also, *e.g.*, *Lipscomb v. Fed. Labor Relations Auth.*, 333 F.3d 611, 618 (5th Cir. 2003) (rejecting similar sovereign-immunity claim as to the Federal Service Labor-Management Relations Act because the state adjutant general "assumes" a "federal character . . . under the Technicians Act"). Petitioner is aware of no cases to the contrary (and, again, state respondents cite none).[4] Accordingly, even if it were not waived, state

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[4] State respondents further argue that, consistent with their view of the constitutional principles, 32 U.S.C. § 709(f) must be read as limiting all challenges to employment decisions by dual-status technicians to appeals to the state adjutant general. SBIO 11. This argument also fails. First, it is waived because it was not raised in any of the courts below. Second, as noted in the text, courts have entertained Title VII claims against state militia officials, and state respondents once again fail to cite any precedent showing that any court has ever barred such a claim under 32 U.S.C. § 709(f). Third, the National Guard statute does not purport to bar claims for discrimi-

respondents' argument is wrong and poses no barrier to review. Again, moreover, state respondents would be free to raise any claim or defense on remand after this Court resolves the threshold issue regarding federal respondents.

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nation or retaliation, for which Title VII expressly extends protection as to "[a]ll personnel actions affecting employees or applicants for employment . . . in military departments." 42 U.S.C. § 2000e-16(a). The only case cited by state respondents – *Alexander v. United States*, 143 F. App'x 340 (Fed. Cir. 2005) (per curiam), see SBIO 15 – is not a Title VII case.

CONCLUSION

For the foregoing reasons and for those set forth in the opening brief and in the reply to the federal respondents' brief in opposition, the Court should grant the petition for a writ of certiorari.

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April 27, 2011